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In The

Supreme Court of the United States

October Term, 1997

CENTRAL TRANSPORT, INC. and
UNIVERSAL AM-CAN, LTD.,

Petitioners,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION,

Respondents.

**On Petition For Writ Of Certiorari
To The Michigan Supreme Court**

PETITION FOR WRIT OF CERTIORARI

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105 pp

QUESTION PRESENTED FOR REVIEW

1. Whether Section 601 of the Federal Aviation Administration Authorization Act of 1994 ("Section 601"), which prohibits virtually all state regulation of intrastate motor carriers, except for certain specified safety powers, preempts the annual per-vehicle fee provision for intrastate motor carriers contained in the State of Michigan's former economic regulatory statute?

PARTIES

I. **PETITIONERS**

(1) Universal Am-Can, Ltd.*

(2) Central Transport, Inc.*

II. **RESPONDENTS**

(1) Michigan Public Service Commission

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* Universal Am-Can, Ltd., and Central Transport, Inc. were wholly-owned subsidiaries of CenTra, Inc., a privately owned Delaware corporation. Universal maintains that status. Central Transport, Inc., has ceased operations. Neither corporation has or had subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES	ii
OPINIONS	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. STATEMENT OF FACTS	2
B. HISTORY OF PROCEEDINGS AND BASIS FOR FEDERAL JURISDICTION	5
REASONS FOR GRANTING THE WRIT	6
A. THE CONTINUED IMPOSITION OF STATE FEES DESIGNED FOR THE ADMINISTRATION OF AN ECONOMIC REGULATORY STATUTE FOR TRUCKING COMPANIES CONTRAVENES THE PLAIN LANGUAGE OF THE FEDERAL SECTION 601 PREEMPTION AND, ACCORDINGLY, THE SUPREMACY CLAUSE	7
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Federal:

American Airlines v. *Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed. 2d 715 (1995) 14

Kelley v. *United States*, 69 F.3d 1503 (10th Cir. 1995), *cert. den.* 517 U.S. 1166, 116 S.Ct. 1566, 134 L.Ed. 2d 665 (1996) 7

Michigan Canners and Freezers Association, Inc. v. *Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed. 2d 399 (1984) 6, 12, 13

Morales v. *TransWorld Airlines*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed. 2d 157 (1992) 14

Schneidewind v. *ANR Pipeline Co.*, 45 U.S. 293, 108 S.Ct. 1145, 99 L.Ed. 2d 316 (1988) 6, 12, 13

State:

Federal Armored Service v. *Public Service Commission*, 204 Mich. App. 24, 514 N.W.2d 178 (1994) 8

In re Federal Preemption of Provisions of the Motor Carrier Act, 223 Mich. App. 288, 566 N.W.2d 299 (1997) 1

In re Joe Brown & Sons, 273 Mich. 652, 263 N.W. 887 (1935) 8

CONSTITUTIONAL PROVISIONS/ STATUTES/REGULATIONS

Federal:

Commerce Clause, U.S. Const., Art. I, Sec. 8, cl. 3 7

Supremacy Clause, U.S. Const., Art. VI, cl. 2 .....2, 7

TABLE OF AUTHORITIES – Continued

Page

Airline Deregulation Act of 1978, Pub. L. No. 95-405, 92 Stat. 1707 14

Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, Title IV, 108 Stat. 1604 2

ICC Termination Act of 1995, Pub. L. No. 104-88 2

28 U.S.C. § 1257 5

28 U.S.C. § 1257(a) 1

28 U.S.C. § 1331 5

49 U.S.C. § 11501(h) 2

49 U.S.C. § 14501(c)(2)(A) 4, 12

49 U.S.C. § 14504 12

49 U.S.C. § 14504(c)(2)(B)(iv)(3) 12

49 U.S.C. § 41713(b)(4) 2

State:

M.C.L. 475.1 2

M.C.L. 475.2 10

M.C.L. 476.1; 477.1 7

M.C.L. 476.5 7

M.C.L. 476.7 8

M.C.L. 476.7(c) 8

M.C.L. 477.2 7

M.C.L. 477.6 8

TABLE OF AUTHORITIES – Continued

Page

M.C.L. 478.2 9

M.C.L. 479.41-479.43 9

M.C.L. 480.11(a) 9

Other:

H.R. Conf. Rep. No. 677, 103D Cong., 2d Sess., at 83 (1994), reprinted in 1994 USCCA 677 at 1755 14

PETITON FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Universal Am-Can, Ltd., and Central Transport, Inc. respectfully pray that a Writ of Certiorari issue to review the judgment of the Michigan Supreme Court and Michigan Court of Appeals.

OPINIONS

The opinion of the Michigan Court of Appeals (Appendix "A", *infra*, p. 1) denying the appeal of Petitioners is reported at *In re: Federal Preemption of Provisions of the Motor Carrier Act*, 223 Mich. App. 288, 566 N.W.2d 299 (1997). The opinion of the Michigan Supreme Court (Appendix "B", *infra* p. 30) denying Petitioners' Application for Leave to Appeal to that body appears at 458 Mich. 852, ___ N.W.2d ___ (1998). The decision of the Michigan Public Service Commission finding that the fee provisions of the Act are not preempted (Appendix "C", *infra*, p. 32) is unreported.

JURISDICTION

Jurisdiction of this Court to review this matter by Writ of Certiorari is provided by 28 U.S.C. § 1257(a). The Petitioners seek review of a final order and judgment of the Michigan Supreme Court of June 29, 1998, denying Petitioners' Application for Leave to Appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There is one constitutional provision involved, the Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, cl. 2 (Appendix "D", *infra*, p. 79). The statute involved is Section 601 of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), that was initially enacted at 49 U.S.C. § 11501(h), and as amended by the ICC Termination Act of 1995, recodified 49 U.S.C. § 11501(h) at 49 U.S.C. § 14501(c) (Appendix "E", *infra*, p. 80).

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

This Petition involves an appeal from a decision of the Michigan Public Service Commission ("MPSC") interpreting the scope of the federal preemption of state motor carrier regulation brought about by Section 601 of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, Title IV, 108 Stat. 1604.[1] ("Section 601"). On September 8, 1994, shortly after the enactment of Section 601, but before its effective date, the MPSC acting *sua sponte*, commenced a contested case proceeding, as Docket No. T-1273, to determine the scope

[1] This section was amended and recodified in part, at 49 U.S.C. § 14501, by the ICC Termination Act of 1995, Pub. L. No. 104-88 (December 29, 1995). It formerly appeared at 49 U.S.C. § 11501(h). See also, 49 U.S.C. § 41713(b)(4), for the corresponding "air carrier affiliates" preemption language of Section 601.

of the preemption contained in Section 601, until such time as the Michigan legislature amended the Michigan Motor Carrier Act, M.C.L. 475.1 *et seq.*, 1933 P.A. 254, to conform to the federal preemption. Section 601, which became effective on January 1, 1995, prohibits any state, or any branch or political subdivision thereof from enacting or enforcing any laws or regulations relating to any price, route, or service in intrastate commerce of: (a) an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement); or (b) any motor carrier.

Petitioners, Universal Am-Can, Ltd. ("Universal") and Central Transport, Inc. ("Central") participated as parties of record in the proceedings before the MPSC, arguing that the broad scope of the congressional preemption precluded the continued assessment of the fee provisions in Michigan's economic regulatory statute of $100 per unit per year, which, in the case of Petitioner Central, amounted to over $55,000 in calendar year 1994, and in the case of Petitioner Universal, amounted to over $21,000 in that year.

Prior to the enactment of Section 601, 41 states, including Michigan, had laws that in some fashion provided for economic regulation of their intrastate motor carrier industries. Such regulations had been in place in Michigan since 1933. Michigan regulated entry into the intrastate trucking industry, as well as the rates to be charged by that industry. The Michigan law was designed to further numerous purposes, including universal access

by businesses to trucks and transportation facilities, establishment of non-discriminatory pricing and service, and the setting of reasonable price levels, while avoiding congestion on the public highways or interference with the use of those highways by the traveling public. These state laws, including Michigan's, were judged by Congress in 1994 to impose unreasonable burdens on interstate commerce, impede the free flow of traffic in interstate commerce, and place unreasonable costs on American consumers. Section 601(a). Congress did, however, at 49 U.S.C. § 14501(c)(2)(A) provide that the preemption:

> shall not restrict the safety regulatory authority of a state with respect to motor vehicles, the authority of a state to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a state to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

The Michigan Public Service Commission, in its order issued January 11, 1995, determined that it could still exercise jurisdiction over intrastate motor carriers under the provisions of the economic regulatory statute, from a safety and financial fitness aspect, and could continue to charge the annual per-vehicle fee requirement set forth in the Act, pending any Michigan legislative reaction to Section 601. At the time of the filing of this Petition, there has been no legislative reaction and Michigan continues to charge the challenged fee to Michigan intrastate motor carriers.

B. HISTORY OF PROCEEDINGS AND BASIS FOR FEDERAL JURISDICTION

This is an appeal from a state administrative proceeding commenced by the MPSC on its own motion on September 8, 1994. On January 11, 1995, the MPSC issued an order finding the fee requirements, as well as its continued ability to regulate from a safety standpoint, outside the ambit of the Section 601 preemption. Petitioners Central and Universal timely appealed that decision to the Michigan Court of Appeals. On April 25, 1997, the Michigan Court of Appeals issued its published decision in the Central-Universal action, one of three consolidated cases challenging various aspects of the MPSC's decision on the scope of the preemption. The Court of Appeals affirmed the MPSC's finding that Section 601 did not preempt the fee provisions in the Act. The Court of Appeals specifically refused to address certain constitutional issues raised by the continued imposition of the fees, as the MPSC had no authority, under state law, to determine the constitutionality of statutes. (See *In re: Motor Carrier Act, supra,* 223 Mich. App. 288, p. 303).

Petitioners then filed an Application for Leave to Appeal with the Michigan Supreme Court. That Petition was denied by order of the court dated June 29, 1998. The basis for federal jurisdiction over this action is 28 U.S.C. § 1257 and § 1331. Petitioners now seek a Writ of Certiorari from this Court. The validity of a state statute is drawn into question as repugnant to a law of the United States.

II. REASONS FOR GRANTING THE WRIT

The continued imposition of state fees, not taxes, designed for administration of an economic regulatory statute enacted in the middle of the Depression is a bold affront to the Supremacy Clause of the United States Constitution and the actions of Congress, in exercising its powers under the Commerce Clause to regulate interstate commerce. Michigan continues to burden interstate commerce, by charging the fees in question, far in excess of the $10 per year per vehicle fees permitted by Congress of the states for registration of interstate carriers. The decision of the Michigan courts, in affirming the MPSC's action to continue charging these economic regulatory fees, is directly contrary to the plain language of Section 601, and further flies in the face of the precedent of this Court with respect to the manner of determination of the scope of preemption, in cases such as *Michigan Canners and Freezers Association, Inc.* v. *Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed. 2d 399 (1984), and *Schneidewind* v. *ANR Pipeline Co.*, 45 U.S. 293, 108 S.Ct. 1145, 99 L.Ed. 2d 316 (1988). A state should not be allowed to ignore an important federal preemptive statute in the field of interstate commerce in blatant violation of the Supremacy Clause.

A. THE CONTINUED IMPOSITION OF STATE FEES DESIGNED FOR THE ADMINISTRATION OF AN ECONOMIC REGULATORY STATUTE FOR TRUCKING COMPANIES CONTRAVENES THE PLAIN LANGUAGE OF THE FEDERAL SECTION 601 PREEMPTION AND, ACCORDINGLY, THE SUPREMACY CLAUSE.

The Supremacy Clause in Article VI of the United States Constitution makes the laws of the United States made in pursuance of constitutional powers the supreme law of the land. The Constitution conferred on Congress the power to regulate commerce among the several states. U.S. Const., Art. I, Sec. 8, cl. 3. The courts have held that Section 601 is a valid exercise by Congress of its powers under the commerce clause. *Kelley* v. *United States*, 69 F.3d 1503, (10th Cir. 1995), *cert. den.* 517 U.S. 1166, 116 S.Ct. 1566, 134 L.Ed. 2d 665 (1996).

The Michigan regulatory act prohibits common and contract carriers of property from operating without obtaining either a certificate of authority, in the case of common carriers, or an operating permit, in the case of contract carriers. See M.C.L. 476.1; 477.1. Although the safety of applicants was examined as part of the application process, that process itself focused on such concepts as the demonstrated public need for additional service, the avoidance of excess service, and the effect a denial of a permit would have on shippers. See M.C.L. 476.5, for common carrier standards, and M.C.L. 477.2 for contract carrier standards. The strict economic standards were in place in 1994 even though the Act had been "liberalized" through two ostensible reform amendments to the Act in

1982[2] and 1993[3]. Similarly, Michigan kept tight control on motor carrier rates, requiring them to be just, reasonable, and non-preferential, in the case of common carriers (M.C.L. 476.7), and non-predatory, in the case of contract carriers (M.C.L. 477.6). Operating authority of trucking companies, under this regimen, was carefully circumscribed, often using Byzantine language. Carriers were not free to raise or lower their rates in an unfettered fashion.[4] It was the kind of heavy-handed regulation exercised by Michigan and other states that Congress found offensive and detrimental to interstate commerce, in preempting state economic regulation.

From its initial passage in 1933, the decisions of the MPSC and the courts with respect to interpretation of the Michigan Motor Carrier Act had one focus – that of economic regulation of competition. See, in that regard, decisions from *In re: Joe Brown & Sons*, 273 Mich. 652, 263 N.W. 887 (1935), a case focusing on the meaning of a grant of operating authority, and the claim that an order of the MPSC's predecessor agency fostered "monopolies", to *Federal Armored Service* v. *Public Service Commission*, 204 Mich. App. 24, 514 N.W.2d 178 (1994), a case focusing on financial fitness of an applicant, as well as the meaning of

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[2] 1982 P.A. 399.

[3] 1993 P.A. 352. That latter provision had not been effect for a full year, when the preemption took effect.

[4] There was, in its most recent incarnation, a zone of rate freedom of 20% per year, which carriers could exercise without MPSC interference. See M.C.L. 476.7(c).

the term "demonstrated public need" and quality of shipper support evidence required for a proposed new motor carrier service.

Safety was but a small component of the state economic regulatory scheme for intrastate motor carriers.[5] The primary responsibility for safety regulation of trucking companies instead resides in the Motor Carrier Division of the Michigan State Police, which administers the separate Motor Carrier Safety Act of 1963, M.C.L. 480.11(a) *et seq.*, the provisions of which apply not just to intrastate for-hire trucking companies, but to all operators of commercial motor vehicles on Michigan highways.

The Michigan Motor Carrier Act has further provided that the fees which are the subject matter of this action are collected "for the administration of this Act." See M.C.L. 478.2. These charges are designated as fees, not taxes. These fees had as their cornerstone an economic regulatory purpose.

Although safety is a word contained in the Act's title as drafted in 1933, it is plain that the entire title has as its main focus economic regulation.[6] Similarly, the legislative

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[5] The economic regulatory focus did not change, as a result of the 1993 amendments to the Act, which did add certain additional provisions with respect to truck safety, at M.C.L. 479.41-479.43.

[6] The title of the 1933 Michigan Motor Carrier Act is as follows: "An act to promote safety upon and conserve the use of public highways of the state; to provide for the supervision, regulation and control of the use of such highways by all motor vehicles operated by carriers of property for hire upon or over such highways; to preserve, foster, and regulate transportation

purposes enumerated at M.C.L. 475.2, although one of those 14 purposes does mention safety, are concerned with the maintenance of regulated competition in the motor carrier industry.[7]

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and permit the coordination of motor vehicle transportation facilities; to provide for the supervision, regulation, and control of the use of such highways by all motor carriers for hire for such purposes; to classify and regulate carriers of property by motor vehicles for hire upon such public highways for such purposes; to give the Michigan Public Service Commission jurisdiction and authority to prevent evasion of this Act through any device or arrangement; to insure adequate transportation service; to give the Commission jurisdiction and authority to fix, alter, regulate and determine rates, fares, charges, classifications and practices of common motor carriers for such purposes; to require filing with the Commission of rates, fares, and charges of contract carriers and to authorize the Commission to prescribe minimum rates, fares, and charges, and to require the observance thereof; to prevent unjust discrimination; to prescribe the powers and duties of said Commission with reference thereto; to provide for appeals from the orders of such Commission; to confer jurisdiction upon the Circuit Court for the County of Ingham for such appeals; to provide for the levy and collection of certain privilege fees and taxes for such carriers for such purposes and the disposition of such fees and taxes; and to provide for the enforcement of this Act; and to prescribe penalties for its violations."

[7] That legislative purpose reads as follows: "It is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the Commission the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters, whether specifically mentioned herein or not, so as to: (a) relieve all future undue burdens and congestion on the highways arising by reason of the use of the highways by motor vehicles operated by motor carriers; (b) protect and conserve the highways and

Despite the preemption of the heart of its motor carrier regulatory statute, Michigan has continued to require carriers to pay its $100 per year per self-propelled power unit fee. This is despite the fact that the intrastate preemption leaves jurisdiction over motor carriers to the states only with respect to "minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." That is the language employed by Congress at 49 U.S.C. § 14501(c)(2)(A), when the term *motor carriers*, as contrasted with the term *motor vehicles*, is referenced. The safety regulatory of a state with respect to motor vehicles, i.e., the enforcement of a state's safety laws with respect to traffic, as well as size, weight, and hazardous materials regulations, are also not preempted, but those are not regulated by the MPSC – they are regulated by the state police.

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protect the safety and welfare of the traveling and shipping public in their use of the highways; (c) promote competitive and efficient transportation services; (d) meet the needs of motor carriers, shippers, receivers, and consumers; (e) allow a variety of quality, price and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; (h) promote intermodal transportation; (i) prevent unjust discrimination; (j) promote greater participation by minorities in the motor carrier system; (k) provide and maintain service to small communities and small shippers; (l) prevent evasion of this Act through any device or arrangement; (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; and (n) promote the use of jointly considered and initiated rates, classifications, divisions, allowances, charges, or rules of motor carriers under Commission-approved agreements."

Congress has further provided that states may require interstate motor carriers to register their operations, pursuant to a registration system set forth at 49 U.S.C. § 14504, but such fees may not exceed $10 per vehicle per year for the filing of satisfactory proof of required insurance with the states. See 49 U.S.C. § 14504(c)(2)(B)(iv)(3). Congress has thus determined the maximum charge for the filing of such insurance proof to be $10 per motor vehicle per year. The $100 per motor vehicle per year Michigan charge far exceeds the permissible limit.

The Michigan action, in failing to find such fees preempted flies in the face of the rules established for determination of preemption questions in cases such as *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 99 L.Ed. 2d 316 (1988), and *Michigan Canners and Freezers Association, Inc.* v. *Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed. 2d 399 (1984). As was stated by this Court in *Schneidewind*,

> "The circumstances in which federal law preempts state regulation are familiar. . . . A preemption question requires an examination of Congressional intent. . . . Of course, Congress explicitly may define the extent to which its enactments preempt state law. . . . In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the states, where the federal interest in the field is sufficiently dominant, or where 'the object sought to be obtained

> by the federal law and the character of the obligations imposed by it reveal the same purpose.' . . . Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is preempted, when it actually conflicts with federal law." (Citations omitted).

In *Schneidewind*, this Court found that the MPSC was regulating a natural gas company pursuant to state statute in an area that the federal government had occupied to the exclusion of state law. In *Michigan Canners*, this Court held another attempt by Michigan to regulate pursuant to a state statute to conflict with a federal statute which, while not totally occupying the field, "st[ood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Michigan Canners, supra*, 81 L.Ed. 2d at 412.

In this case, the plain language utilized by Congress dictates a preemption finding. The Section 601 residual state safety authority refers to motor carriers, only with respect to financial responsibility (i.e., insurance) matters. Tellingly, the safety regulation now exercised by the MPSC, with the imposition of the fee, applies only to intrastate for-hire motor carriers, not to interstate motor carriers operating over Michigan highways, the operations of which are based in states other than Michigan, to companies operating their own private fleets (i.e., so-called private carriers), or to carriers transporting commodities, such as farm products and newspapers, exempt from regulation under the Michigan act. The fee is being imposed, then, only on those carriers which wish to serve on a for-hire basis in Michigan intrastate commerce, the

same kind of obstacle to which Section 601 was directed in the first place.

In addition to the plain language of the Act, the Congressional history does not support the imposition of these charges as well. Congress made plain that it desired to accomplish the same broad preemption which it had earlier effected by the Airline Deregulation Act of 1978, Pub. L. No. 95-405, 92 Stat. 1707, and interpreted by this Court in cases such as *Morales* v. *TransWorld Airlines*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed. 2d 157 (1992), and *American Airlines* v. *Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed. 2d 715 (1995). Congress specifically referred to this Court's interpretation in *Morales* of the scope of the Airline Deregulation Act preemption. H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess., at 83 (1994), reprinted in 1994 USCCA 677 at 1755. Congress plainly stated that the "central purpose of this legislation is to extend to all affected carriers . . . the identical intrastate preemption of prices, routes and services as that originally contained in the Federal Aviation Act." *Id*. Congress also noted, in the same conference report, that although the states had been left with certain safety regulation, that regulatory authority was not to be used "as a guise for continued economic regulation as it relates to prices, routes, or services." H.R. Conf. Rep. No. 677, *supra*, at 84.

Yet, that is exactly what Michigan has continued to do through the imposition of a fee designed for the administration of economic regulation. The two Petitioners in this case have expended significant sums of money under this fee for calendar years 1995 and after, in order to continue to operate in Michigan intrastate

commerce.[8] These fees remain costly to consumers, as carriers must increase their rates to cover the costs of these fees. The fees continue to serve as an obstacle to entry.

CONCLUSION

The continued imposition of these fees designed for the administration of an economic regulatory statute by the State of Michigan affronts the preemptive scope of Section 601. No other state continues to charge fees of this magnitude, and only four other state[9] charge intrastate annual fees in excess of the $10 per year established by Congress for state registration of carrier interstate operations. It does not cost tens of thousands of dollars per year to determine whether a carrier has insurance. This Petition for Writ of Certiorari should be granted, so that this Court can fully examine this violation by the State of Michigan of a federal statute and the Supremacy Clause of the United States Constitution.

Respectfully submitted,

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[8] Central Transport has now ceased operations.

[9] Ohio ($30), Rhode Island ($20), Idaho ($21) and Connecticut ($17.50).

APPENDIX A

in re FEDERAL PREEMPTION OF PROVISIONS OF THE MOTOR CARRIER ACT

Docket Nos. 182950, 186569, 186726. Submitted September 16, 1996, at Lansing. Decided April 25, 1997, at 9:35 A.M. Leave to appeal sought.

The Public Service Commission, on its own initiative, commenced a proceeding to consider the preemptive effect of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-305, on Michigan's Motor Carrier Act, MCL 475.1 *et seq.*; MSA 22.531 *et seq.*, and the associated regulations promulgated pursuant to that act. The PSC's stated intention was to provide guidance to motor carriers until the Legislature amended the Motor Carrier Act to conform with the federal preemptive intent of § 601 of the FAAAA. The PSC issued two opinions and orders in which it concluded that § 601 preempts only regulatory provisions concerning price, routes, and service, but that it left substantial residual regulatory authority in the PSC with respect to issues such as safety, as well as the authority to continue to certify intrastate motor carriers and to assess statutory fees. In Docket No. 182950, Central Transport, Inc., and Universal Am-Can, Ltd., appealed that portion of the PSC's decision that held that the FAAAA did not entirely preempt state regulation of motor carriers under the Motor Carrier Act and that various statutory fees were not preempted. In Docket No. 186569, Michigan Intra-State Motor Tariff Bureau, Inc., and National Motor Freight Traffic Association, Inc., appealed that portion of the PSC's decision–that held that § 601 of the FAAAA preempts the Michigan regulatory requirements concerning collectively established joint-line rates and freight classifications. In Docket No. 186726, Michigan Teamsters

Joint Council No. 43 appealed that portion of the PSC's decision that held that the leasing provisions of MCL 479.10a(6); MSA 22.575(1)(6) were preempted by § 601 of the FAAAA. The appeals were consolidated.

The Court of Appeals *held:*

1. The PSC's decision that the FAAAA preempted certain provisions of the Motor Carrier Act and its resulting decision not to enforce those statutory requirements that it found to be preempted by the federal act constituted the fixing of rates, fares, charges, and classifications or an order fixing regulations, practices, or services within the meaning of MCL 462.26(1); MSA 22.45(1) Accordingly, the PSC's order implementing its decision by refraining from enforcing those provisions of the Motor Carrier Act that it found to be preempted by the FAAAA was properly subject to a direct appeal to the Court of Appeals under these circumstances, and such an appeal is consistent with the efficient appellate process that was intended by the Legislature.

2. The PSC, in implementing its review of the extent of the federal preemption intended by § 601 of the FAAAA, did not undertake to rewrite the Motor Carrier Act, but rather exercised its statutory power to supervise and regulate motor common carriers of property and to do those things necessary to carry out and enforce the Motor Carrier Act to the extent permitted by the federal limitations on the state's right to regulate such activities.

3. It is clear from the language of § 601 that Congress intended to preempt from state

regulation only certain matters relating to economic regulation of the trucking industry. Congress did not intend to preempt all state regulation of the trucking industry, § 601 expressly excepting from its preemptive effect state regulation of matters relating to safety, the size and weight of vehicles, insurance requirements, and the transportation of household goods. Accordingly, the PSC did not err in holding that § 601 did not preempt from state regulation the entire field of trucking regulation or in holding that certain portions of the Motor Carrier Act remained inforce.

4. The PSC properly held that the provisions of the Motor Carrier Act relating to the assessment of certain statutory fees was not preempted by § 601 of the FAAAA. Because the PSC retains significant regulatory obligations with respect to motor carrier operations, and because there is nothing to suggest that the statutory fees at issue were intended to relate only to those regulatory activities that the PSC found to be preempted by § 601, there was no showing that § 601 had the effect of preempting the continued assessment by the PSC of the statutory fees set forth in the Motor Carrier Act.

5. The question whether the PSC's decision concerning the preemptive effect of § 601 of the FAAAA had the effect of denying equal protection because of a differing treatment of "for-hire motor carriers" and "other commercial motor vehicle operators" is not properly before the Court of Appeals in the context of these appeals.

6. The clear and unambiguous language of subsection h(3) of § 601 of the FAAAA, PL 103-305, § 601(h)(3), is that state regulations relating to

antitrust immunity for collective rate making of joint-line rates are exempted from the preemptive effect of § 601 where compliance with a state regulatory scheme is no more burdensome than compliance with the federal regulatory scheme and a carrier had requested such regulation. Although the Michigan statutory and regulatory scheme relating to collective rate making of joint-line rates different from the federal regulatory scheme in effect at the time of the PSC's decisions with respect to certain reporting requirements, the PSC's finding that compliance with Michigan's reporting scheme was more burdensome than compliance with the federal reporting scheme is not supported by competent, material, and substantial evidence. Accordingly, the PSC erred in holding that the Michigan statutes and regulations relating to collective rate making of Joint-line rates were preempted by § 601 of the FAAAA.

7. The PSC determined that the leasing provision of MCL 479.10a(6); MSA 22.575(1)(6), which requires that a truck that is being operated under a lease or contract be operated by a person who is an employee of the holder of the lease or contract, is preempted by § 601 of the FAAAA. There was evidence on the record supporting the PSC's finding that the primary purpose of the leasing provision of subsection 10a(6) related to labor organizing rather than to safety concerns and that the enforcement of that subsection had a significant economic effect, with any safety-related aspect of the subsection being secondary at best. Although the PSC did not specifically hold that MCL 479.10a(6); MSA 22.575(1)(6) constituted economic regulation, the PSC's action in holding that § 601 preempted the

operation of that subsection implicitly demonstrates that the PSC found that subsection to be for the purpose of economic regulation.

Affirmed in part, vacated in part, and remanded.

JANSEN, J., dissenting in part, stated that the decision of the PSC that the leasing provision of MCL 479.10a(6); MSA 22.575(1)(6) is preempted should be reversed because that provision is clearly related to safety and insurance concerns, which are not subject to preemption, rather that [sic] to economic concerns, which are subject to preemption.

1. APPEAL – PUBLIC SERVICE COMMISSION – FEDERAL PREEMPTION.

A decision by the Public Service Commission to refrain from enforcing some of the provisions of the Motor Carrier Act and some of the regulations promulgated pursuant to that act on the basis of federal preemption constitutes the fixing of rates or regulations within the meaning of the statute that provides an appeal as of right in the Court of Appeals from an order of the Public Service Commission fixing any rates or regulations (MCL 462.26[1]; MSA 22.45[1]).

2. CARRIERS – MOTOR CARRIERS – FEDERAL PREEMPTION – INTENT OF CONGRESS.

Congress in enacting the Federal Aviation Administration Authorization Act of 1994 did not intend to preempt all state regulation of the trucking industry, but rather expressly excepted from the preemptive effect of that act state regulation of matters relating to safety, the size and weight of

vehicles, insurance requirements, and the transportation of household goods (PL 103-305, § 601).

3. CARRIERS – COLLECTIVE RATE MAKING – JOINT-LINE RATES – FEDERAL PREEMPTION.

The Federal Aviation Administration Authorization Act of 1994 does not preempt state regulation of the activities of motor carriers insofar as they relate to antitrust immunity of collective rate making of joint-line rates where compliance with a state regulatory scheme is no more burdensome than compliance with the corresponding federal regulatory scheme and a carrier has requested such regulation (PL 103-305, § 601[h][3][A][iv], [h][3][B][i]).

4. CARRIERS – COLLECTIVE RATE MAKING – JOINT-LINE RATES – FEDERAL PREEMPTION.

The Michigan regulatory scheme for providing motor carriers with antitrust protection with respect to collective rate making of joint-line rates is no more burdensome than the corresponding federal regulatory scheme; accordingly, Michigan is not preempted from providing motor carriers with antitrust protection by regulating collective rate making of joint-line rates where a carrier has requested such regulation (PL 103-305, § 601[h][3]).

5. CARRIERS – MOTOR CARRIER ACT – LEASED VEHICLES – ECONOMIC REGULATION – SAFETY – FEDERAL PREEMPTION.

The provision in the Motor Carrier Act that requires the person who operates a leased motor carrier to be an employee of the holder of the lease to the vehicle was intended to make it easier for labor unions to organize the vehicle operators and, thus, was primarily intended as economic regulation

rather than safety regulation; the leased vehicle provision, being an economic regulation that affects routes, services, and probably prices, is subject to federal preemption under § 601(h) of the Federal Aviation Administration Authorization Act of 1994 (PL 103-305, § 601[h]; MCL 479.10a[6]; MSA 22.575[1][6]).

Foster, Swift, Collings & Smith, P.C. (by *John W. Ester, Robert E. McFarland,* and *Peter R. Albertins*), for Central Transport, Inc., and Universal Am-Can, Ltd.

Foster, Swift, Collings & Smith, P.C. (by *Robert E. McFarland*), for Michigan Intra-State Motor Tariff Bureau, Inc., and National Motor Freight Traffic Association, Inc.

Bagleo, Silverberg & Goldman (by *John R. Bagileo* and *Claire Shapiro*) pro hac vice, for National Motor Freight Traffic Association, Inc.

Rudell & O'Neill (by *Kevin J. O'Neill*), for Michigan Teamsters Joint Counsel No. 43.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, and *Don L. Keskey, Henry J. Boynton,* and *Judith I. Blinn,* Assistant Attorneys General, for the Public Service Commission.

Loomis, Ewert, Parsley, Davis & Gotting, P.C. (by *William D. Parsley*), for Morgan Drive Away, Inc.

Sullivan and Leavitt, P.C. (by *Martin J. Leavitt*), for Aggregate Carriers Association of Michigan, Inc., and Cement Carriers Association.

Butzel Long (by *William R. Ralls, Leland R. Rosier,* and *Wendel V. Hall*), for United Parcel Service.

Before: MACKENZIE, P.J., and JANSEN and T. R. THOMAS*, JJ.

MACKENZIE, P.J. The Michigan Public Service Commission (PSC) issued opinions and orders on January 11, 1995, and May 18, 1995, pertaining to the effect of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-305, on Michigan's Motor Carrier Act, 1933 PA 254, as amended, MCL 475.1 *et seq.*; MSA 22.531 *et seq.* This Court consolidated the appeals of those decisions by several interested parties. Addressing only those aspects of the PSC's decisions that are directly challenged by appellants, we affirm in part, vacate in part, and remand.

The FAAAA was signed by President Clinton on August 23, 1994, and took effect on January 1, 1995. Section 601(h) of the FAAAA, PL 103-305, § 601, entitled "Preemption of Intrastate Transportation of Property," codified at the time of enactment as 49 USC 11501(h), but subsequently recodified as amended as 49 USC 14501(c), provides:

> Preemption of State economic regulation of motor carriers.
>
> (1) General rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service

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* Circuit judge, sitting on the Court of Appeals by assignment.

of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier with respect to the transportation of property.

(2) Matters not covered. Paragraph (1)

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(B) does not apply to the transportation of household goods.

(3) State standard transportation practices.

(A) Continuation. Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules, or

(iv) antitrust immunity for joint line rates or routes, classifications and mileage guides, if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements. A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this subtitle or a regulation issued by the Interstate Commerce Commission or the Secretary of Transportation under this subtitle; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election. Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

It has long been the PSC's obligation to supervise and regulate the transportation of property by motor vehicle for hire upon the public highways of Michigan. MCL 475.2; MSA 22.532. Michigan's Motor Carrier Act applies to entities engaged in interstate commerce only to the extent it is consistent with federal law. MCL 476.12; MSA 22.545.

On September 8, 1994, the PSC, acting on its own initiative, commenced the instant proceeding, No. T-1273, to consider the preemptive effect of the federal legislation and to give the PSC an opportunity to express its view regarding which portions of the Motor Carrier Act and the associated regulations were preempted. The PSC's

stated intention was to provide guidance to motor carriers until the Legislature amends the Motor Carrier Act to conform with the federal preemption. The PSC did not attempt to address the constitutionality of § 601, but rather assumed it was constitutional.

The PSC concluded that § 601 preempts only regulatory provisions concerning price, routes, and service – the essence of economic regulation. The PSC found it had substantial residual regulatory authority, including regulatory authority over matters such as safety. The PSC further concluded that it should continue a certification process (albeit, a "streamlined" certification process) for intrastate motor carriers and that it could and should continue to assess statutorily mandated fees. The PSC appended to its decisions copies of the Motor Carrier Act and the related rules with lines drawn through the large portions of the act and the rules that it concluded had been preempted. Since issuing its decisions, the PSC has ceased enforcing those provisions of the Motor Carrier Act that it concluded had been preempted.

Under MCL 462.26(8); MSA 22.45(8), it is an appellant's burden to show by clear and satisfactory evidence that the order of the PSC complained of is unlawful or unreasonable. *Michigan Intra-State Motor Tariff Bureau, Inc v Public Service Comm*, 200 Mich App 381, 387; 504 NW2d 677 (1993). This Court gives due deference to the PSC's administrative expertise and will not substitute its judgment for that of the PSC, particularly in legislative matters such as setting rates. *Id.*, p 388. However, judicial deference is not as great with respect to administrative interpretations of recent legislation as it is with respect to administrative interpretations of longstanding legislation.

Telephone Ass'n of Michigan v Public Service Comm, 210 Mich App 662, 670; 534 NW2d 223 (1995); *In re Filing Requirements for Telecommunications Complaints*, 210 Mich App 681, 692-693; 534 NW2d 234 (1995).

JURISDICTION

Numerous acts under which the PSC has been granted regulatory authority incorporate the appeal provisions in MCL 462.26; MSA 22.45. See, e.g., MCL 460.4; MSA 22.13(4), MCL 484.114; MSA 22.1454, repealed by 1991 PA 179, MCL 483.110; MSA 22.1320, MCL 460.59; MSA 22.9, MCL 460.557(6); MSA 22.157(6), MCL 460.301(6); MSA 22.101(6), and MCL 460.506; MSA 22.146. Also see the provisions listed in *Sullivan v Public Service Comm*, 93 Mich App. 391, 396-397; 287 NW2d 188 (1979). Appeals from PSC decisions regarding the Motor Carrier Act are no exception. MCL 479.20; MSA 22.585 provides that "[a]ny order or decree of the commission shall be subject to review in the manner provided for in [MCL 462.26; MSA 22.45]."

Under MCL 462.26(1); MSA 22.45(1), an appeal as of right to this Court may be filed by any common carrier or other party in interest who is "dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services. . . . "

The question arises whether the PSC's orders, which provide a "framework" and "guidance" to motor carriers, constitutes the "fixing" of rates, fares practices, and services that forms the basis for this Court's jurisdiction under MCL 462.26(1); MSA 22.45(1). "Fix" in MCL

462.26(1); MSA 22.45(1) should be construed in the sense the word was intended by the Legislature to be used in the statute. *In re Certified Question*, 433 Mich 710, 723; 449 NW2d 660 (1989); *Aikens v Dep't of Conservation*, 387 Mich 495, 499; 198 NW2d 304 (1972).

"Fixed" has numerous meanings. The first definition in Black's Law Dictionary, 4th ed, is "adjust or regulate." The PSC's decisions at issue adjust or regulate many practices of motor carriers in this state by, in effect, declining to enforce numerous provisions in the Motor Carrier Act. For example, the PSC found preempted the requirement that a shipper applying for a certificate of authority present evidence that the service it proposes will serve a required public purpose and the requirement that the proposed service will not be excess service. MCL 476.5(1)(c), (2)(b); MSA 22.538(1)(c), (2)(b). Had the PSC enforced these requirements, rather than eliminating them, there would be no question that the PSC "fixed" a regulation.

Other examples abound. Carriers are no longer required to file schedules of rates or to avoid predatory pricing. MCL 476.6; MSA 22.539. Statutory restrictions with respect to unreasonable rates and standards for reasonable rates are no longer enforced. MCL 476.7; MSA 22.540, MCL 476.7a; MSA 22.540(1). The penalty provision for unlawful discrimination is no longer enforced. MCL 476.8; MSA 22.541. The PSC no longer exercises its power to determine reasonable and sufficient rates, fares, charges, and classifications under MCL 476.10; MSA 22.543.

The sweeping change in the PSC's enforcement practices constitutes the "fixing" of rates, charges, regulations, and practices contemplated in MCL 462.26(1); MSA 22.45(1). Such widespread relaxation of regulation of the trucking industry should not escape appellate scrutiny on the basis of a narrow construction of the word "fix" in MCL 462.26(1); MSA 22.45(1). The effect of the PSC's decisions has been immediate and is more than merely advisory. For example, freight classifications filed by appellant National Motor Freight Traffic Association, Inc., on behalf of more than forty carriers were rejected by the PSC on the basis of its May 18, 1995, decision.

The federal preemption legislation and the PSC's decisions substantially changed the regulatory framework for the trucking industry in Michigan. The result is similar to the situation in the telecommunication industry. This Court reviewed a PSC decision that provided guidance regarding changes in telecommunications regulation in *In re Procedure for Filing Telecommunications Tariffs*, 210 Mich App 533; 534 NW2d 194 (1995).

There is no better forum than this Court in which to appeal the decisions at issue here. While an appeal to the circuit court under MCL 600.631; MSA 27A.631 might be available, starting the appellate process in the circuit court would simply add an additional level to the appellate process in an appeal in which the record is complete. We think our Legislature had a more efficient appellate process in mind when it consolidated the method of appeal for numerous regulatory acts in the procedure set forth in MCL 462.26; MSA 22.45. Indeed, we recognized in *Sullivan, supra*, p 396, that the Legislature intended nearly all PSC matters to be appealed under § 26.

NO. 182950

Among the conclusions in the PSC's January 11, 1995, decision were the determinations that § 601 of the FAAAA did not entirely preempt state regulation under Michigan's Motor Carrier Act and that various fees mandated in MCL 477.12-478.8; MSA 22.559-22.565(2) were not preempted. Appellants Central Transport, Inc., and Universal Am-Can, Ltd. dispute these determinations and further argue that if the PSC is correct, then an equal protection violation results because an unjustified distinction is made between "for-hire motor carriers" and "all other commercial motor vehicle operators." In a preliminary argument, appellants contend that the PSC lacked authority to issue the decisions appealed.

The PSC is a creature of the Legislature, and its authority must be found in statutory enactments. *Union Carbide Corp v. Public Service Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988); *In re Quality of Service Standards for Regulated Telecommunications Services*, 204 Mich App 607, 611; 516 NW2d 142 (1994). The PSC does not have authority to determine the constitutionality of statutes. *Dation v. Ford Motor Co*, 314 Mich 152, 159-160; 22 NW2d 252 (1946); *Universal Am-Can, Ltd v. Attorney General*, 197 Mich App 34, 37; 494 NW2d 787 (1992). Nowhere is the PSC granted the authority to rewrite statutes, which is what appellants Central Transport and Universal AmCan claim the PSC did in this case.

The PSC was clear in avoiding constitutional issues, and it recognized that amendments of the Motor Carrier

Act were the province of the Legislature. The PSC did not "rewrite" the Motor Carrier Act. Rather, the PSC issued considered decisions that indicated how its regulation of the trucking industry in Michigan was affected by federal legislation preempting at least some aspects of state regulation. This action by the PSC was within its power to supervise and regulate motor common carriers of property and to do all things necessary to carry out and enforce the Motor Carrier Act. MCL 476.10; MSA 2.543. The action by the PSC was also appropriate under MCL 475.2; MSA 22.532, which grants the PSC the power and authority to supervise and regulate the transportation of property by motor vehicle for hire. Regardless of the correctness of its decisions, rendering those decisions provided a uniform framework under which the trucking industry could carry out its activities in Michigan. The PSC exercised its inherent power necessary to carry out its duties. *In re Telecommunications Tariffs, supra,* p 540; *In re Quality of Service Standards, supra,* p 613.

Appellants Central Transport and Universal Am-Can fashion their argument that § 601 preempted the entire field of trucking regulation through the use of United States Supreme Court decisions interpreting the Airline Deregulation Act of 1978, PL 95-504, 49 USC 41713. Those decisions give a broad construction to the phrase "relating to rates, routes, or services." See *Morales v Trans World Airlines, Inc,* 504 US 374; 112 S Ct 2031; 119 L Ed 2d 157 (1992); *American Airlines, Inc v Wolens,* 513 US 219; 115 S Ct 817; 130 L Ed 2d 715 (1995). The preemptive language involved in those cases is quite similar to the preemptive language in § 601. In both instances states are prohibited

from enacting or enforcing legislation related to prices, routes, or service.

Congressional intent is the cornerstone of preemption analysis. *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997). Regardless of the similarities between the Airline Deregulation Act of 1978 and § 601 of the FAAAA, it is clear and unambiguous from the language of § 601 that the congressional intent was not to preempt all state regulation of the trucking industry. Section 601 expressly excepts from its preemptive effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of insurance requirements, and regulation of the transportation of household goods. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent. *Tryc v Michigan Veteran's Facility*, 451 Mich 129; 545 NW2d 642 (1996). Furthermore, the House Conference Report indicates that "economic regulation" is intended to be preempted and that states retain their authority to regulate various aspects of the transportation industry. See H R Conf Rep No. 677, 103d Cong, 2d Sess, pp 84-85. The title given to § 601(h) is "Preemption of State *Economic* Regulation of Motor Carriers." (Emphasis added.) The argument that Congress intended to preempt the entire field of regulation of motor carriers fails in the face of the language of the legislation and its history. The PSC's determination that § 601 was intended to preempt only economic regulation is consistent with the language and history of the legislation.

Appellants Central Transport and Universal Am-Can next argue that the "fee collection provisions" of the

Motor Carrier Act were preempted, even if the entire act was not preempted. The only "fee provisions" specifically referred to by these appellants are MCL 478.1; MSA 22.560 (a $100 application fee and a $50 renewal fee), MCL 478.1a; MSA 22.560(1) (a $50 fee for filing protests), and MCL 478.2; MSA 22.561 (covering several fees ranging in amount from $10 to $100, including a $100 annual fee assessed against and collected from each motor carrier for administration of the act). These appellants contend that because the primary focus of the PSC in the past had been economic regulation, federal preemption of economic regulation means that the fees assessed for that regulation are also preempted.

Section 601 did not preempt the entire Motor Carrier Act. Section 601 of the FAAAA does not in its words indicate an intent to preempt fee provisions such as those challenged by these appellants. The legislative history reflects a contrary intent. The House Conference Report states that nothing in the legislation is intended to change the application of state tax laws to motor carriers. H R Conf Rep No 677, *supra*, p 85.

The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact,

because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation.

Appellants Central Transport and Universal Am-Can further argue that the PSC's decision resulted in an equal protection violation with respect to "for-hire motor carriers" because these carriers are subject to safety regulation under the Motor Carrier Act while "other commercial motor vehicles operators" are not subject to safety regulation under the act; however, they do not precisely define who is included in "all other commercial motor vehicles operators." The PSC limited its decision to motor carriers within its jurisdiction, including "motor common carriers of property" and "motor contract carriers of property." MCL 475.1(f), (h); MSA 22.531(f), (h). More importantly for our purposes, the PSC did not decide the equal protection argument raised before it. The PSC acted lawfully and reasonably in doing so. The PSC does not possess the power to determine the constitutionality of statutes, and direct challenges to the constitutionality of statutes belong in a different forum. *Universal Am-Can Ltd, supra,* pp 37-38. We decline to further review the equal protection argument, given the posture of this appeal. There is no determination by the PSC for this Court to review. The argument is not developed sufficiently for this Court to consider it in the first instance.

NO. 186569

After considering testimony regarding the subject, in its May 18, 1995, decision the PSC concluded that § 601 preempted Michigan regulatory requirements concerning collectively established joint-line rates and freight classifications. Provisions regarding this aspect of the PSC's regulatory authority are found at least in MCL 475.2(n); MSA 22.532(n), MCL 476.7b; MSA 22.540(2), and MCL 479.6b; MSA 22.571(2). These provisions form the basis for anti-trust immunity for entities such as appellants Michigan Intra-State Motor Tariff Bureau, Inc., and National Motor Freight Traffic Association, Inc., that are involved in collectively setting rates and freight classifications. *Southern Motor Carriers Rate Conference, Inc v United States,* 471 US 48; 105 S Ct 1721; 85 L Ed 2d 36 (1985).

Our Legislature has clearly indicated its approval of collective rate-making activities in declaring it a policy of this state to promote such activities. MCL 475.2(n); MSA 22.532(n), as amended by 1993 PA 352. The framework for regulating such activities is provided in MCL 479.6b; MSA 22.571(2), as amended by 1993 PA 352. Furthermore, the Legislature expressly deprived the PSC of authority to eliminate collective rate making through the exercise of its authority under MCL 479.6b; MSA 22.571(2). MCL 479.6b(1); MSA 22.71(2)(1). Thus, the PSC's decision regarding collective rate-making activities contravened clearly stated transportation policy of this state.

When Congress passed § 601 it did not intend a sweeping preemption of state regulation relating to collective rate-making activities. This is evident from the

existence of a specific exception for "antitrust immunity for joint line rates or routes, classifications and mileage guides. . . . " Section 601(h)(3)(A)(iv). The House Conference Report states that subsection h(3) permits continued state regulation over the four enumerated "standard transportation practices" and that the purpose of subsection h(3) is to permit carriers, on an optional basis, to be subject to state regulation in the four areas specified in the subsection, including the antitrust immunity for joint rate-making activities. H R Conf Rep No 677, *supra*, pp 85-86. Consequently, joint rate-making activities are not preempted, provided the requirements of § 601 are satisfied.

In order to avoid preemption of regulation of collective rate-making activities, § 601(h)(3)(B)(i) requires state law to be "no more burdensome than compliance with" federal law regarding the regulated activity and that a carrier request such regulation. Appellants did request such regulation.

The question becomes whether Michigan's regulation is more burdensome than the federal regulation. Federal regulation of collective rate-making activities, as found in 49 USC 10701, 10706, 10761, and 10762 before the general amendment and recodification of the title by PL 104-88, was quite similar to the equivalent Michigan regulation found in MCL 476.7; MSA 22.540, MCL 479.6b; MSA 22.571(2), and MCL 476.6; MSA 22.539. This is not surprising, because much of the Michigan statutory scheme was added by 1982 PA 399 shortly after the federal law changed. However, the PSC found that in three respects Michigan's regulatory scheme was more burdensome than that imposed by federal authority.

The PSC found Michigan's requirements in MCL 479.6b(6), (7); MSA 22.571(2)(6), (7), and rules implementing those provisions, to be more burdensome than federal requirements with regard to posting notice of meetings, maintaining minutes of activities, filing copies of bylaws and other organizational documents, and submitting a schedule of dues and charges. But rules implementing 49 USC 10706 before its amendment by PL 104-88 contain essentially the same requirements as the Michigan statutes and rules. 49 CFR 1331.2, 1331.3, and 1331.5. The PSC also did not find a federal requirement similar to the notice and hearing requirement in MCL 479.6b(11); MSA 22.571(2)(11). But such a federal requirement was evident from 49 CFR 1331.3(b), requiring a published notice in the Federal Register that includes an indication of how a hearing may be obtained. Thus, Michigan's requirements were not more burdensome than the federal requirements with respect to these two points relied upon by the PSC.

The third Michigan requirement that the PSC found more burdensome was the requirement in MCL 479.6b(4); MSA 22.571(2)(4) that each motor carrier participating in a collective agreement provide the name, address, and other information regarding every entity having an interest of at least $100 in the motor carrier. The comparable federal statute in force at the time the PSC made its decisions required carriers to list every entity having an interest valued at $1 million or more. 49 USC 10706(b)(3)(A) before its amendment by PL 104-88. While there was a difference between the Michigan and federal scheme regarding this point, this does not mean that compliance with the Michigan regulatory scheme was more burdensome than complying with the federal

scheme. Indeed, the three witnesses who testified, including Thomas Lonergan, director of the PSC's Motor Carrier Division, recognized the difference but thought that the PSC's regulation of collective rate making was no more burdensome than the federal regulation.

The fact that Michigan has a much lower cutoff point for reporting financial interest in motor carriers does not mean that reporting will be any more burdensome. There is no necessary connection between the size of financial interests and the number of those interests. A carrier may have more parties with interest exceeding $1 million than parties with interests between $100 and $1 million. The burden of reporting would seem to be essentially the same in all cases, because motor carriers can be expected to know who has a financial stake in them. The PSC's finding that compliance with Michigan regulations concerning the providing of information about entities with a financial interest in a motor carrier was more burdensome than compliance with comparable federal requirements was not supported by competent, material, and substantial evidence. Const 1963, art 6, § 28; *Michigan Intra-State Motor Tariff Bureau, supra,* p 388. The PSC's conclusion that Michigan statutes and rules pertaining to collective rate making and collectively established freight classifications are preempted by § 601 is unlawful and unreasonable. MCL 462.26(8); MSA 22.45(8).

NO. 186726

The PSC considered testimony whether the "leasing" provisions in MCL 479.10a; MSA 22.575(1) were preempted by § 601. After considering the testimony and

arguments of numerous parties and witnesses, the PSC concluded in its May 18, 1995, decision that only some parts of MCL 479.10a; MSA 22.575(1) were preempted, including MCL 479.10a(6); MSA 22.575(1)(6), which provides:

> The lease, contract, or arrangement shall provide that the vehicle, at all times, while being operated under the lease, contract, or arrangement, shall be operated only by persons who are employees of the holder who stand in relation to the holder as employee to employer.

Appellant Michigan Teamsters Joint Council No. 43 contends that MCL 479.10a(6); MSA 22.575(1)(6) is not preempted by § 601 because subsection 10a(6) is related to conditions of safety, insurance, and labor concerns and not to economic regulation of price, route, or service.

While it can be argued that subsection 10a(6) affects safety concerns, the PSC did not find that the purpose of subsection 10a(6) was safety-related. Rather, the PSC found that the subsection was added by the Legislature in 1959 in order to make it easier for drivers to be organized by labor interests. This finding was supported by the testimony of witnesses, and therefore the PSC's finding was adequately supported by the record. Const 1963, art 6, § 28. The PSC also reasoned that the requirement in subsection 10a(6) that leased vehicles be operated by employees constituted a barrier to entry for many interstate motor carriers who relied upon independent contractors for drivers. The testimony of several witnesses supported these findings by the PSC. The PSC will not lose its authority to regulate safety if subsection 10a(6) is

preempted. The PSC recognized that preemption of subsection 10a(6) will not increase the risk of uninsured vehicles in intrastate traffic, because the Motor Carrier Act otherwise contains insurance requirements, such as in MCL 476.5; MSA 22.538 and MCL 479.9; MSA 22.574.

From the PSC's findings it follows that subsection 10a(6) has a significant economic effect and that its safety-related aspect is secondary at best. The PSC's finding that subsection 10a(6) is preempted as a provision relating to price, route, or service is reasonable. The testimony relied upon by the PSC supports the conclusion that subsection 10a(6) is "related to" the costs and ability of many motor carriers to provide their services in Michigan. For example, carriers operating in interstate commerce and using independent contractors as drivers have to make special arrangements to operate intrastate traffic in Michigan. A carrier handling traffic from a point outside Michigan to a point inside Michigan could not use the same vehicle (or at least not the same independent contractor as a driver) to transport property wholly within Michigan as part of a return trip. Thus it is clear that subsection 10a(6) affects routes and services and most probably affects prices.

Although the PSC did not expressly state in its decision that subsection 10a(6) constituted "economic regulation," that the PSC reached this conclusion is evident from its opinion. After concluding the MCL 479.10a; MSA 22.575(1) was not entirely economic regulation, the PSC went on to decide that subsection 10a(6) on an individual basis was preempted. Consequently, the PSC reasoned that subsection 10a(6) does constitute economic regulation. The PSC's conclusion in this regard was supported by the

evidence and was not unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8).

DISPOSITION

In Nos. 182950 and 186726, the PSC's decisions are affirmed. In No. 186569, the PSC's decisions are vacated to the extent they determine that collective rate making and classification activities are preempted by § 601 of the Federal Aviation Administration Authorization Act of 1994. This matter is remanded to the PSC for further consideration consistent with this opinion.

Affirmed in part, vacated in part, and remanded. We retain no further jurisdiction. No taxable costs pursuant to MCR 7.219, a question of public policy being involved.

T. R. THOMAS, J., concurred.

JANSEN, J. *(concurring in part and dissenting in part).* I concur with the majority that this Court has jurisdiction to decide these appeals. I also concur with the majority in Docket No. 182950 that the Public Service Commission (PSC) correctly determined that various fees mandated under MCL 477.12, 478.1-478.8; MSA 22.559-22.565(2) are not preempted by § 601 of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-305. I further concur with the majority in Docket No. 186569 that the decision of the PSC must be vacated because § 601 of the FAAAA, PL 103-305, § 601, does not preempt the collective rate making and classifications found in MCL 475.2(n); MSA 22.532(n), MCL 476.7b; MSA 22.540(2), and MCL 479.6b; MSA 22.571(2). However, I respectfully dissent from the decision of the majority in Docket No.

186726 affirming the PSC's determination that the leasing provisions in MCL 479.10a; MSA 22.575(1) are preempted by § 601. I would reverse the PSC's determination in this regard because I do not believe that the leasing provisions are preempted by federal law.

The PSC determined, and the majority agrees, that the following statutory provision is preempted by § 601:

> The lease, contract, or arrangement shall provide that the vehicle, at all times, while being operated under the lease, contract, or arrangement, shall be operated only by persons who are employees of the holder who stand in relation to the holder as employee to employer. [MCL 479.10a(6); MSA 22.575(1)(6).]

I do not find the above statutory provision to be preempted for several reasons. First, the legislative history of the FAAAA indicates that Congress did not intend to preempt leases. Specifically, H R Conf Rep No 677, 103d Cong, 2d Sess, p 88, states in relevant part:

> After years of official policy against intrastate motor carrier deregulation, the American Trucking Associations issued a position on June 24, 1994 which stated that "ATA will no longer oppose Federal preemption of state regulation of motor carrier rates and entry based on economic factors," with some conditions that would allow regulatory protection to continue for *non-economic factors*, such as liability rules, antitrust immunity to publish documents, insurance, safety, *leasing* and cargo credit rules. The conferees have attempted to address these conditions in Section 11501 of title 49 as amended by this provision. [Emphasis added.]

Second, it is clear from the wording of the federal statute itself and from the legislative history that preemption under § 601 be quite narrow. Section 601(h) is simply labeled "[p]reemption of state economic regulation of motor carriers." Moreover, the "[g]eneral rule" set forth in § 601(h)(1) states that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to a price, route, or service* of any motor carrier." (Emphasis added.) The statute also includes "[m]atters not covered," § 601(h)(2), which includes safety-related requirements, insurance-related requirements, the transportation of household goods, and size and weight limitations on highways. Further, the legislative history indicates:

> The central purpose of his legislation is to extend to all affected carriers, air carriers and carriers affiliated with direct air carriers through common controlling ownership on the one hand and motor carriers on the other, the identical intrastate preemption of prices, routes and services as that originally contained in Section 105(a), 49 USC App 1305(a)(1), of the Federal Aviation Act. [H R Conf Rep, *supra*, p 83.]

Thus, it is clear from the statute and from the legislative history that Congress intended that federal preen ption of state laws be narrowly drawn.

The question, then, is whether the PSC correctly determined that our statutory provision concerning leasing related to a price, route, or service of a motor carrier. The PSC determined that the leasing provision was designed to benefit organized labor and constituted the type of state-imposed economic regulation that § 601 was

intended to preempt. The Michigan Teamsters Joint Council No. 43 argued that the leasing provision was related to safety, fitness, and adequacy of insurance. I agree with the position taken by the Teamsters.

MCL 469.10a(6); MSA 22.575(1)(6) requires that the vehicle be "operated only by persons who are employees of the holder who stand in relation to the holder as employee to employer." Having control over the driver of the vehicle is surely a safety-related matter. If the motor carrier has selection of and control over the driver, then safety measure would be increased because the motor carrier would be responsible for the driver. There is also an additional concern that an owner-operator is less likely to operate without first obtaining insurance, rather than the motor carrier. Therefore, MCL 469.10a(6); MSA 22.575(1)(6) is better read as assuring that leased equipment operates under the control of a motor carrier and that the carrier is fully responsible for the driver and the safety and insurance of the vehicle.

Again, I emphasize that the legislative history of § 601 clearly indicates that leasing is considered to be a noneconomic factor. Accordingly, I believe that the PSC's finding that MCL 469.10a(6); MSA 22.575(1)(6) is preempted is an error of law that must be reversed. MCL 462.26(8); MSA 22.45(8); *Ass'n of Businesses Advocating Tariff Equity v. Public Service Comm*, 219 Mich App 653, 659; 557 NW2d 918 (1996).

APPENDIX B

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

Order

Entered: June 29, 1998
109478
110089

In Re FEDERAL PREEMPTION OF PROVISIONS OF THE MOTOR CARRIER ACT

CENTRAL TRANSPORT, INC. and UNIVERSAL AM-CAN, LTD.,

Plaintiffs-Appellants

v.

SC:	109478	SC:	109478 & 110089
COA:	182950	COA:	182950 & 186569
MPSC:	T-1273	MPSC:	T-1273

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant-Appellee.

MICHIGAN INTRA-STATE MOTOR TARIFF BUREAU, INC., and NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
Plaintiffs-Appellees,

v

SC: 110089
COA: 186569
MPSC: T-1273

MICHIGAN PUBLIC SERVICE COMMISSION,
Defendant-Appellant,
and
UNITED PARCEL SERVICE,
Appellee.

On Order of the Court, the applications for leave to appeal are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

j0623

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 29, 1998 /s/ Jacqueline B. MacKinnon
Deputy Clerk

APPENDIX C

STATE OF MICHIGAN

BEFORE THE MICHIGAN
PUBLIC SERVICE COMMISSION

In the matter of contested case proceedings for an order regarding the Michigan Motor Carrier Act, federal preemption, and continuing jurisdiction of the Commission.	)))))	Case No. T-1273

At the January 11, 1995 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. Ronald E. Russell, Commissioner
Hon. John L. O'Donnell, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On August 23, 1994, President Clinton signed into law the Federal Aviation Administration Authorization Act of 1994 (FAA Act), amending Title 49, United States Code, Title VI, Section 601 of the FAA Act (Section 601) is entitled "Preemption of intrastate transportation of property," and takes effect on January 1, 1995. Section 601 states in pertinent part:

"(h) PREEMPTION OF STATE ECONOMIC REGULATION OF MOTOR CARRIERS. –

"(1) GENERAL RULE. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier [other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) of this title] or any motor private carrier with respect to the transportation of property.

"(2) MATTERS NOT COVERED. – Paragraph (1) –

"(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

"(B) does not apply to the transportation of household goods.

"(3) STATE STANDARD TRANSPORTATION PRACTICES. -

"(A) CONTINUATION. – Paragraph (1) shall not affect any authority of a State, or political authority of 2 or more states to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to –

"(i) uniform cargo liability rules,

"(ii) uniform bills of lading or receipts for property being transported,

"(iii) uniform cargo credit rules, or

"(iv) antitrust immunity for joint line rates or routes, classifications and mileage guides,

if such law, regulation, or provision meets the requirements of subparagraph (B).

"(B) REQUIREMENTS. – A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if –

"(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this subtitle or a regulation issued by the Interstate Commerce Commission or the Secretary of Transportation under this subtitle; and

"(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

"(C) ELECTION. – Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law,

regulation, or provision of a State, political subdivision, or political authority under this paragraph."[1]

On September 8, 1994, the Commission issued an order initiating this proceeding to examine the effect of Section 601 on Michigan's Motor Carrier Act, 1933 PA 254, as amended, MCL 475.1 et seq., (the Act) and the Motor Carrier Rules, R 460.18101 through 460.19301 of the Michigan Administrative Code (the Rules). In that order, the Commission proposed to issue a decision in this case expressing its view regarding which sections of the Act and the Rules have not been preempted by Section 601, and thus remain binding on motor carriers subject to the Commission's jurisdiction. In doing so, it hoped to provide a framework for motor carriers to follow until the Legislature brings the Act into compliance with Section 601. The Commission further stated that this proceeding is not intended to address the constitutionality of Section 601, but rather assumes that it is constitutional and will take effect on January 1, 1995.

Pursuant to due notice, a prehearing conference was held on October 5, 1994 before Administrative Law Judge Theodora M. Mace (ALJ). In addition to recognizing the

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[1] Section 601's effect on state motor carrier regulatory authority arises from adding this language to 49 USC 11501 as subsection "h". Thus, citations to its provisions should be accomplished by referring to Section 11501(h) et seq., rather than Section 601(h) et seq. Nevertheless, nearly all of the parties to this cases refer to Section 601(h) et seq. in their testimony, statements, and briefs. Therefore, for purposes of simplicity, this order will also refer to the newly adopted provisions as Section 601(h) et seq.

right of the Commission Staff (Staff) to participate in this proceeding, the ALJ granted petitions to intervene filed by the following parties: Brink's Incorporated; Chemical Leaman Tank Lines, Inc. (Chemical Leaman); J.B. Hunt Transport, Inc. (J.B. Hunt); the American Automobile Manufacturers Association (AAMA); United Parcel Service, Inc.; Kubach Cartage, Inc.; the Michigan Movers and Warehousemen's Association (MMWA); the Michigan Intra-State Motor Tariff Bureau, Inc. (MIB); Central Transport, Inc., and Universal Am-Can, Ltd. (collectively, Central); Aggregate Carriers of Michigan, Inc., and Cement Carriers of Michigan, Inc. (collectively, Aggregate and Cement Carriers); Morgan Drive Away, Inc., Columbian Distribution Services, Inc. L. Blondeau & Sons Trucking, Inc., McKinley Trucking Co., Inc., Modular Transportation Co., Noble Graham Transport, Inc., Radio Transfer, Incorporated, Saginaw Office Services, Inc., d/b/a SOS Express, W.C. Trucking, Inc., and Wolverine Dispatch, Inc., (collectively, Morgan); ABC Warehouse, Inc., Ciera Expediting, S&D Cartage, Straight Line Trucking Co., Neway-Love Distribution, Inc., Buske Lines, Inc., G.W. Delivery, Inc., Shoreline Express, Inc., W.A. Genso Cartage Co., and Lovetrams, Inc. (collectively, ABC); Busy Bee Movers, Inc., Dearborn Steel Express, Inc., Delpro, Inc., Doviak Trucking, Godfrey Cartage, Inc., Gorski Bulk Transport, Inc., Great Neck, Inc., Hare Express, Inc., Leonard Bros., Inc., Luco Cartage Company, Macoit Logistics, Inc., Santana Transport, Inc., Sargent Trucking, Inc., Surestack, Inc., TBS Trucking Co., Three Star Trucking Co., Transport Carriers, Inc., Two Men and a Truck/Grand Rapids, Inc., Two Men and a Truck/West Oakland, Inc., and Utica Transport, Inc. (collectively, Busy Bee);

and Michigan Teamsters Joint Council No. 43 (the Teamsters).

Cross-examination of all witnesses commenced on October 21 and concluded on November 1, 1994, generating a total of 3 volumes of transcript encompassing 446 pages. In addition, statements of position were received, apparently pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, R 460.17207, from the Michigan Trucking Association (MTA), the Michigan Owner-Operators and Drivers Association (MOOD), the National Motor Freight Traffic Association, Inc. (NMFTA), and R & L Transfer, Inc. (R & L).

Briefs were filed on November 16, 1994 by the Staff and all intervenors except Brink's, Chemical Leaman, J.B. Hunt, and Busy Bee. Finally, reply briefs were filed on November 30, 1994 by all intervenors except Brink's, Chemical Leaman, J.B. Hunt, Busy Bee, the AAMA, ABC, the Aggregate and Cement Carriers, and the Teamsters. In order to expedite the proceedings, the Commission elected to read the record, thus dispensing with the need for a proposal for decision and exceptions.

II.

POSITIONS OF THE PARTIES

Staff

The Staff takes the position that, based on (1) the language of Section 601, (2) statements found in the August 5, 1993 Conference Report issued by Congress in conjunction with the FAA Act (Conference Report), and (3) federal court rulings concerning similar legislation,

the preemptive effect of Section 601 is relatively narrow. For example, the Staff points out that Section 601 speaks only in terms of preempting state laws or regulations concerning the "price, route, or service of any motor carrier." [Section 601(h)(1).] Among other things, the Staff notes, Section 601 specifically exempts from preemption a state's "safety regulatory authority," its authority "to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization," and its authority to regulate "the transportation of household goods." [Section 60(h)(2).] The Staff further notes that, in the Conference Report, Congress stated that the list of exceptions to federal preemption found in Section 601 is not intended to be all-inclusive but, rather, is intended only to specify some of the matters that do not concern prices, routes, or services and are therefore not preempted. Moreover, the Staff asserts that rulings in *Margolis v United Airlines, Inc.*, 811 F Supp 318 (ED Mich. 1993), and *Hodges v Delta Airlines, Inc.*, 4 F3d 350 (CA 5, 1993), concerning the scope of legislation partially deregulating the airline industry, narrowly interpreted the preemptive scope of words like "services." Accordingly, it contends, the adoption of Section 601 preempts only certain aspects of state motor carrier regulation, while allowing many aspects to continue.

The Staff therefore asserts that, although most intrastate carriers will no longer be subject to limitations on such things as the prices they charge, the commodities they transport, the geographic scope of their operations, the customers they serve, the type of equipment they use, the size of the packages they handle, and the period of

time in which they must complete their deliveries, many other requirements imposed by the Act and the Rules remain in effect. Thus, Thomas R. Lonergan, Director of the commission's Motor Carrier Regulation Division (Motor Carrier Division), provided a detailed analysis of which provisions of the Act and Rules should be retained and applied once Section 601 takes effect. This analysis culminated in the Staff's, submission of a marked-up copy of both the Act and the Rules.

According to Mr. Lonergan, the procedures and criteria for issuance of either a temporary or permanent certificate of authority based on the safety and fitness of the proposed motor carrier, pursuant to Articles I and II of the Act, are not preempted. Rather, they are necessary for the Commission to exercise its authority to ensure safe operations of motor carriers and the welfare of the public." (2 Tr. 93.) Mr. Lonergan therefore stated that the existing process regarding the granting of certificates[2] should be retained, but that the grant or denial of an application must be based on issues of safety, fitness, and adequacy of insurance. In reaching this conclusion, he noted that all considerations concerning prices, routes, and services (like those found in MCL 476.5, 476.6, 476.7, 476.7a, and 476.8) should be deemed preempted.

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[2] This process generally requires the submission of an application by the potential motor carrier, publication of the application in the biweekly Information Bulletin, receipt of evidence in support of or opposition to the application, and issuance of the Commission's decision.

Mr. Lonergan went on to state that, because Section 601 removes the distinction between common and contract carriage, Articles II and III of the Act would essentially be identical. He therefore proposed that the Commission treat Article III as superfluous.

As for Article IV, Mr. Lonergan claimed that the continued collection of fees from interstate and intrastate motor carriers is "essential for implementing a program of motor carrier safety." (2 Tr. 95.) Because much of the authority vested in the Commission by the Act is not preempted by Section 601, he testified that revenue collection for the Act's enforcement is also not preempted. Moreover, Mr. Lonergan asserted, any reduction, increase, or modification of the fees found in the Act can only be accomplished by legislation.

Mr. Lonergan went on to state that sections of Article V concerning the renewal or transfer of motor carrier authority are necessary to ensure that safe operations are maintained and that the public is protected. The same is true, he asserted, for all provisions allowing for the filing and consideration of complaints (at least when they concern fitness, safety, and adequacy of insurance), the preservation and examination of motor carrier records, the impounding of vehicles, the revocation of intrastate authority, and other means of enforcing the Act or any lawful order, rule, or regulation issued pursuant to the Act. Furthermore, citing Section 601(h)(3)(iv), Mr. Lonergan indicated that the Commission's provision of antitrust immunity pursuant to MCL 479-6b was not preempted as far as the establishment of freight classifications, mileage guides, and joint-line rates are

concerned. However, he went on to state that the Commission's ability to regulate collective ratemaking as it pertains to single-line rates was, in his opinion, preempted by Section 601.

Turning to the issue of whether the Commission should continue to regulate motor carriers' lease arrangements pursuant to MCL 479.10a, Mr. Lonergan testified that such regulation:

> "[I]nsures accountability on the part of the motor carrier for the use of leased equipment including so-called owner-operators who may not hold a certificate from the [Commission]. This section is clearly designed to assure that the leased equipment operates under the control of the certificated carrier and the carrier is fully responsible for the safety and insurance of the equipment." (2 Tr. 101-102.)

In light of this testimony, and because state regulation of safety, fitness, and adequacy of insurance is specifically exempted from preemption under Section 601, the Staff asserts that MCL 479.10a must continue to be enforced. Finally, Mr. Lonergan noted that Article VI of the Act deals exclusively with motor carrier safety. Thus, the Staff contends, MCL 479.41 through 479.43 are not preempted.

With regard to the Rules, the Staff asserts that the Commission need only consider as preempted those rules corresponding to statutory provisions that are found to be preempted by Section 601. Thus, based on an assessment of the Rules provided by Mr. Lonergan, the Staff makes the following proposals. First, noting that Part 1 of the Rules deals with definitions and the establishment of the Motor Carrier Advisory Board, it asserts that only

those definitions relating to economic regulation of motor carriers are preempted. As for Part 2 of the rules, which sets fourth requirements concerning the form and content of applications and protests, the Staff contends that only those provisions concerning service are preempted. The remaining language, which relates to issues of safety and fitness, would remain in effect. Similarly, it asserts that Part 3, which concerns the use of "modified procedure" to process applications when no hearing is necessary, is only preempted as it pertains to considerations of service. Next, the Staff notes that Part 4 of the Rules governs the form of certificates, the impropriety of leasing one's certificate to another motor carrier, and the substitution of equipment in the case of an emergency. According to the Staff, all language concerning the routes or services covered by a certificate is preempted. Moreover, based on its earlier proposal to treat Article III of the Act as superfluous (because Section 601 ends the distinction between common and contract carriage), the Staff says that all references to "permits" for contract carriers should also be removed from Part 4.

As for Part 5 of the Rules, concerning vehicle identification requirements, the Staff contends that only the rule concerning the need to carry a summary of authority is preempted. It goes on to assert that Part 6, governing transfers of authority, is preempted only as it pertains to the discontinuance of service, obtaining a certificate for speculation, and the treatment of unpaid claims or other service-related issues. Next, the Staff points out that the rules contained in Part 7, concerning shipping documents and cargo credit rules, fall within the optional areas of state regulation discussed in Sections 601(h)(3)(ii) and

(iii). It therefore contends that they are not preempted. As for Part 8, concerning accounting and reporting requirements, the Staff believes that these rules are entirely preempted.[3] Furthermore, it claims that although all rules in Part 9 concerning "emergency temporary authority" are preempted, rules concerning applications for regular "temporary authority" are not preempted "except so far as [they involve] service and rate certification." (2 Tr. 104.)

Turning to Part 10 of the Rules, the Staff asserts that all provisions concerning collective ratemaking fall within the optional area of state regulation described in Section 601(h)(3)(iv). Thus, although they would no longer apply to collectively-established single-line tariffs, the Staff contends that these rules are not preempted with respect to joint-line tariffs. part II pertains to the insurance requirements imposed by the Act. According to the Staff, all rules concerning the adequacy of liability insurance are specifically exempt from preemption and those concerning cargo insurance fall within the optional area of regulation discussed in Section 601(h)(3)(i). It therefore proposes that they all be retained. In contrast, the Staff says that all of the rules in Part 12, which relate to rates and tariffs, are preempted. Finally, it suggests that all of the sample forms set forth in Part 13 of the Rules should

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[3] According to Staff witness Lonergan, these *rules* speak solely in terms of financial reports and, therefore, fall within the FAA Act's preemption of economic regulation. However, he went on to state that because the *statue* covering annual reports (namely, MCL 476.10) appears broad enough to cover requests for information on safety-related issues, that section should not be preempted. (See 2 Tr. 307-308.)

be preempted, with the exception of those pertaining to proofs of service.

AAMA

Like the Staff, the AAMA submitted a revised copy of the Act showing precisely which provisions it believes are preempted by Section 601. A comparison of these two proposals reflects a significant level of agreement. For example, the AAMA concurs with the Staff that the Commission should (1) continue enforcing all safety and insurance provisions of the Act[4], (2) issue certificates of authority based solely on fitness, safety, and proof of adequate insurance, (3) cease recognizing any distinction between common and contract carriers, and (4) reserve for the Legislature any changes in the Act's existing fee structure. It further assumes that all provisions of the Act will continue in effect with respect to household goods carriers, pursuant to Section 601(h)(2)(B), and that each rule corresponding to a preempted provision of the Act is likewise preempted.

Although it agrees with most of the Staff's proposals, the AAMA asserts that several other provisions should also be considered preempted. For example, it submits that the protest and intervention provisions of the Act should not survive beyond January 1, 1995 because they

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[4] Nevertheless, the AAMA emphasized that the Commission "should not impose or enforce price, route, or service requirements or sanctions under the guise of safety regulatory authority." (AAMA's brief, p. 5.)

are based on economic regulation, rather than safety concerns. Likewise, the AAMA contends that the provisions of MCL 476.10 regarding annual reports, MCL 479.2(1)(n) concerning restrictions on the ability of a company to perform for-hire transportation for another member of its corporate family, MCL 479.8 regarding vehicle identification, and MCL 479.11 concerning examination of motor carrier books and records pertain to the Commission's economic regulatory authority and, therefore, are preempted. The AAMA further proposes that the provisions of MCL 479.10a, which relate to vehicle and driver leases, should not be enforced after January 1, 1995 because they are not based on safety or insurance considerations. Instead, the AAMA contends, they regulate the economic relationship between the motor carrier and the lessor of the vehicle. Finally, it suggests that the Commission ignore the provisions of the Act concerning transfers of authority. According to the AAMA, implementation of Section 601 should make it so easy to apply for and receive a certificate of authority that there will be no need to obtain an existing carrier's authority by way of transfer.

UPS and Kubach

UPS and Kubach feel that the preemptive scope of Section 601 is somewhat broader than assumed by the Staff. They therefore asserts that the Commission should undertake only the minimum amount of regulation clearly falling within the exceptions specified in Section 601. Nevertheless, they support the Staff's proposal to retain the existing certification system as it pertains to safety, fitness, and proof of adequate insurance and to

allow existing non-household goods carriers to obtain unrestricted certificates in the course of renewing their respective authorities. According to UPS and Kubach, the "prime concern" is simply that no further steps be taken to enforce restrictions on the scope of existing authorities.

Kubach also asserts that, notwithstanding the Staff's conclusion to the contrary, MCL 479.10a(6) is preempted by Section 601. In support of this assertion, Kubach points out that this statutory provision requires leased vehicles used in intrastate transportation to be operated by employees of the motor carriers that lease the equipment. According to Kubach, nothing is more closely connected with a motor carrier's service than the person driving the truck. Kubach therefore argues that, because it interferes with motor carriers' ability to select their own prices, routes, and services, continued application of MCL 479.10a(6) would constitute impermissible state regulation.

Central

Central contends that, notwithstanding assertions to the contrary by the Staff, the AAMA, UPS, and Kubach, Section 601 bars the Commission from undertaking any future regulatory activity under the Act, including safety regulation.[5] In support of this contention, Central claims that it was the clear intent of Congress to preempt all

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[5] In making this assertion, Central specifically recognizes that the Commission would retain its authority to enforce the Act and the Rules as they pertain to household goods carriers and would likewise be allowed to continue regulating the four enumerated areas set forth in Section 601(h)(3)(A).

state economic regulation of the motor carrier industry. Moreover, Central continues, the "primary focus" of the Act has always been on economic regulation, rather than on safety. (Central's brief, p. 13.) It therefore contends that the Commission cannot continue its certification of motor carriers under the guise of safety regulation.

Central further asserts that, although Section 601(h)(2)(A) provides that the scope of federal preemption "shall not restrict the safety regulatory authority of a State with respect to motor vehicles," that provision fails to support the Commission's continued involvement in safety regulation. The reason for this, Central claims, is the use of the phrase "motor vehicles." Had Congress desired to let agencies like the Commission continue to regulate safety, Central argues, it would have used the phrase "motor carriers" instead. Central therefore hypothesizes that the use of the phrase "motor vehicles" signals an intent by Congress only to avoid preempting safety-related activities by law enforcement agencies, and not those undertaken by regulatory bodies like the Commission.

Finally, Central asserts that even if the Commission retains its authority to regulate under those portions of the Act pertaining to safety, such authority would not support the continued application of MCL 479.10a. According to Mickey Blashfield, the Director of Governmental Relations for Central and Universal Am-Can, there is little or no difference between the safety operation of an owner-operator – who works for a motor carrier as an independent contractor – and that of a company employee. (3 Tr. 411.) Moreover, Mr. Blashfield asserts, a leased driver's independent contractor status

would, in his opinion, not relieve the motor carrier from either the insurance or the safety requirements of the Act. Central therefore agrees with Kubach and the AAMA that leasing requirements imposed by that statutory provision are based on economic regulation, rather than safety, and are therefore preempted.

ABC

Like Central, ABC contends that, because the Act focuses primarily on economic regulation, it has been fully preempted by Section 601, and, except for its effect on household goods carriers, no longer represents viable legislation.

ABC further takes exception to various parties' claims that Section 601 allows Michigan to continue providing the antitrust immunity necessary to support collective ratemaking regarding joint-line rates. ABC notes that, pursuant to Section 601(h)(3)(B)(i), the antitrust immunity required for these collectively-established rates must be "no more burdensome" than compliance with federal regulations covering the same activity. Moreover, it contends that, according to *Cantor v The Detroit Edison Company*, 428 US 579; 96 S Ct 3110; 49 L. Ed 2d 1141 (1976), the Commission cannot grant the needed immunity because the activity in question is violative of federal antitrust law. ABC therefore argues that MCL 476.6b is fully preempted and that state antitrust immunity cannot be conferred on any type of collective ratemaking, regardless of whether such ratemaking concerns joint – or single-line rates.

Morgan

Although conceding that Central's position may represent a reasonable reading of Section 601, Morgan largely supports the Staff's view of what provisions have been preempted by the FAA Act. For example, Paul Borghesani, Morgan's President and Chief Operating Officer, testified that the Commission should continue to issue certificates of authority based on fitness, safety, and proof of adequate insurance. (2 Tr. 157-158.) However, there are two exceptions to Morgan's support of the Staff's position. First, Morgan contends that MCL 478.2, concerning annual registration fees, is also preempted. Second, it concurs with several other parties that claim that the leasing requirements of MCL 479.10a are preempted by Section 601.

With regard to MCL 478.2, Morgan contends that the underlying purpose of collecting annual fees is to fund enforcement of the Act by the Motor Carrier Division of the Michigan State Police (State Police). Morgan therefore asserts that because part of the State Police motor carrier enforcement activities (specifically, those relating to prices, routes, or services) are precluded by Section 601, all funding of those activities pursuant to MCL 478.2 is preempted by implication. Morgan goes on to claim that the only remaining motor carrier enforcement power of the State Police concerns the safety of operations under the Motor Carrier Safety Act, 1963 PA 161, MCL 460.11 et seq., (the Safety Act). However, because the Safety Act applies to all commercial vehicles whether operated by a regulated carrier, an exempt carrier, or a private carrier, Morgan argues that requiring only regulated carriers to

fund its enforcement through application of MCL 478.2 constitutes a violation of equal protection.

Turning to MCL 479.10a, it asserts that the leasing requirements imposed by the Act are not the type of safety-related regulations that Section 601 intended to reserve to the states. Rather, Morgan asserts, requirements that equipment leases have a term of at least 30 days [MCL 479.10a(1)] and that leased drivers be considered employees of the lessee [MCL 479.10a(6)] are designed to "restrict the economic relationship between the owner-operator and the carrier." (2 Tr. 162.) Morgan therefore argues that, because Section 601 intended to eliminate such economic regulation, the leasing requirements of MCL 479.10a are preempted.

Aggregate and Cement Carriers

The Aggregate and Cement Carriers agree with those parties who contend that MCL 479.10a(6) should be considered preempted. Like the others, the Aggregate and Cement Carriers claim that requiring drivers of leased equipment to be considered employees neither advances the goal of improving truck safety nor was intended to do so. Although noting that no legislative history can be found regarding this provision, they believe that the motivating factors behind its adoption were labor/management considerations unrelated to the Commission's regulation of motor carrier safety. They further assert that all contrary positions like those expressed by the Staff and the Teamsters, are based on the misconception that preempting the Commission's jurisdiction to enforce

MCL 479.10a(6) would eliminate the duty of motor carriers to insure movements conducted on their behalf by owner-operators. For these reasons, the Aggregate and Cement Carriers request that the Commission find that provision preempted.

MMWA

The only issue addressed by the MMWA concerns the future regulation of household goods movers operating in Michigan. Specifically, it contends that the Act and the Rules should remain in effect and be applied in their entirety to the movement of household goods, regardless of whether their application is preempted for all other purposes. In support of this conclusion, it cites Section 601(h)(2)(B), which states that the preemption of state economic regulation of motor carriers "does not apply to the transportation of household goods." Furthermore, the MMWA points out that, on page 85 of the Conference Report, Congress specifically stated that state authority to regulate the transportation of household goods is "unchanged" and "unaffected" by Section 601. The MMWA therefore asserts that there is no need to go through the Act and the Rules to determine which provisions are preempted as to household goods movers because none of them are.

MIB

The MIB addresses only the issue of collective ratemaking. It asserts that regardless of whether portions of the Act and the Rules pertaining to the establishment and filing of single-line rates are preempted, they should

remain in effect for all collectively-established joint-line rates.

In support of this assertion, the MIB's witness, John Finn, cites Section 601(h)(3)(iv), which provides that states may continue to enact or enforce laws, rules, or regulations related to "antitrust immunity for joint-line rates or routes, classifications and mileage guides." For this to occur, it continues, only two requirements must be met. First, state action in this area must cover the same subject matter as, and be no more burdensome than, federal regulation of joint-line rates. Second, regulation of this area must be requested by the affected motor carriers or their agents. According to the MIB, both requirements have been met. It therefore argues that all statutory provisions found in MCL 475.2(n), 476.6, 476.7, 476.7a, 476.7b, and 479.6b, as well as all requirements found in Parts 10 and 12 of the Rules, should continue to be applied to joint-line rates despite the fact that they are preempted for single-line rates.

Finally, the MIB disagrees with ABC's assertion that, in light of *Cantor, supra,* the Commission is precluded from granting the requested antitrust immunity. According to the MIB, ABC's assertion directly conflicts with the Supreme Court's more recent decision in *Southern Motor Carrier Rate Conference, Inc. v United States,* 471 US 48; 105 S Ct 1721; 85 L. Ed 2d 36 (1985), where it was held that states can allow collective ratemaking so long as (1) that allowance is clearly articulated and affirmatively expressed as state policy, and (2) the state actively supervises the otherwise illegal, anti-competitive conduct.

Because these requirements are met by Michigan's existing regulatory scheme, the MIB concludes, collective ratemaking for joint-line rates should be retained.

Teamsters

Relying on the testimony of Gary Proctor, President of Local No. 124, the Teamsters assert that MCL 479.10a should be retained in its entirety. According to the Teamsters, this section was designed to ensure that motor carriers' use of leased equipment or leased drivers, or both, would not result in reduced adherence to Commission requirements concerning safety and insurance. In this regard, Mr. Proctor testified that eliminating a provision like MCL 479.10a(6), which requires leased drivers to be treated as employees of the lessee, would effectively shift the burden of providing liability and cargo insurance from the motor carrier to the owner-operator it hires to handle the shipment. This would place both the shipper and the public at risk, he continues, because an owner-operator is likely to operate without first obtaining that insurance. The Teamsters therefore argue that, because MCL 479.10a relates to safety regulation, both in design and in practice, it is not preempted by Section 601.

Rule 207 Participants

Written statements of position were offered by four parties that either did not request, or were not granted, intervenor status. Each of these parties' positions are discussed seriatim.

First, the MTA argues that preemptive language like that found in Section 601 has historically been interpreted very broadly. It further claims that because the Act is grounded in economic regulation of motor carriage, and because Congress clearly intended to eliminate such regulation by the states, the provisions of the Act are null and void except for their applications to household goods carriers and the four standard transportation practices listed in Section 601(h)(3)(A). The MTA therefore asks the Commission to rule that the Act and the Rules are preempted in their entirety.

Second, MOOD contends that the leasing provisions found in MCL 479.10a are not safety-related and, therefore, should be considered preempted. For example, MOOD believes that MCL 479.10a(6) was added to the Act at the request of unions, like the Teamsters, and was primarily designed to make owner-operators more accessible to union organizing efforts by declaring them employees of the motor carriers for whom they worked. According to MOOD, continued operation of this provision will place Michigan-based motor carriers at a substantial competitive disadvantage. MOOD goes on to contend that, because Section 601 eliminates most forms of economic regulation by the states, staffing levels in the Motor Carrier Division can be significantly reduced. Therefore, MOOD suggests that the Commission take it upon itself to eliminate the $100 per vehicle registration fee called for under MCL 478.2 and transfer any remaining authority (like that concerning safety, fitness, and adequacy of insurance) to the State Police.

Third, the NMFTA, a non-profit membership corporation that collectively establishes and maintains motor

freight classifications for use by intrastate and interstate motor carriers alike, seeks continued antitrust immunity for its classification activities. Similar to the MIB, the NMFTA contends that Section 601(h)(3)(iv) exempts collectively-set freight classifications from preemption. It therefore asserts that the Commission should continue providing so-called "state action" antitrust immunity by (1) ruling that all provisions of the Act and the Rules pertaining to collectively-established classification systems, including the adherence of member-motor carriers to the classifications, are not preempted, (2) agreeing to "actively supervise" the classification-making process in order to ensure that it serves the public interest, and (3) recognizing the Interstate Commerce Commission's (ICC) supervision of classification proceedings as a supplement to such regulation by this Commission.

Fourth, R & L, the defendant in an on-going complaint proceeding before the Commission[6], contends that effective January 1, 1995, Section 601 prohibits the commencement or continuation of all proceedings seeking to enforce provisions of the Act related to routes and services. According to R & L, the prohibition against these proceedings arises from Section 601's direction that "a State . . . may not enact or *enforce* a law . . . related to a price, route, or service of any motor carrier." (Emphasis

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[6] On July 13, 1994, Central, Alvan Motor Freight, Inc., and Parker Motor Freight, Inc., filed a complaint in Case No. T-1270 alleging that R & L engaged in unauthorized intrastate transportation. The complaint seeks (1) entry of a cease and desist order prohibiting unauthorized service in the future, and (2) imposition of fines against R & L for past violations of the Act.

added.) R & L therefore asks the Commission to confirm that after January 1, 1995, it will terminate all enforcement activities, including informal investigations and complaint proceedings seeking either the imposition of fines or the issuance of cease and desist orders, arising from restrictions on routes and services.

III.

DISCUSSION

The Commission has been called upon in this case to express its opinion regarding which provisions of the Act and the Rules are preempted by Section 601. In undertaking this task, it recognizes that only the Legislature (and not the Commission) may revise the Act and that the Rules must ultimately be amended by the Commission to conform to changes in federal and state law. This order is therefore intended solely to provide guidance regarding how the Commission expects intrastate motor carrier regulation to operate in Michigan after January 1, 1995. Thus, interested parties retain the right to request a different interpretation from the Commission, the courts and the Legislature regarding the effect of Section 601 on the issues addressed below.

Existence of Residual Regulatory Authority

The most important issue to be decided is whether Section 601 preempts the Act and Rules in their entirety (as asserted by Central, ABC, and the MTA) or, instead, preempts only those regulatory provisions concerning price, route, and service (as suggested by the Staff, the AAMA, UPS, and Kubach). In resolving this issue, it is

necessary to discern the Congressional intent behind Section 601. This can best be accomplished by reviewing both the language of Section 601 and its legislative history.

Despite some parties' assertions to the contrary, the wording of Section 601 stops far short of precluding state regulation of all aspects of motor carriage. For example, its heading reads "Preemption of State Economic Regulation of Motor Carriers." This implies that, of the range of areas presently covered by state regulation, economic regulation (rather than regulation of safety, fitness, insurance, etc.) was singled out by Congress for at least partial preemption. Such an implication is further supported by the "General Rule" set forth in Section 601(h)(1), which states only that states "may not enact or enforce a law, regulation, or other provision . . . *related to a price, route, or service*" of any for-hire or private motor carrier. (Emphasis added.) Issues involving prices, routes, and services have long been considered by the motor carrier industry to fall within the definition of economic regulation.

Furthermore, Section 601 lists several exceptions to Congress' preemption of economic regulation. Foremost among these is the statement that Section 601:

> "[S]hall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to

> insurance requirements and self-insurance authorization." [Section 601(h)(2)(A).]

Next, Section 601 states that its preemptive effect "does not apply to the transportation of household goods." [Section 601(h)(2)(B).] Finally, under the heading "State Standard Transportation Practices," Section 601 indicates that it "shall not affect any authority of a State . . . to enact or enforce" a law, rule, or regulation related to uniform cargo liability rules, uniform bills of lading or receipts for property being transported, uniform cargo credit rules, or antitrust immunity for joint-line rates or routes, classifications, and mileage guides. [Section 601(h)(3)(A).] However, it further provides that continuing regulatory authority over these standard transportation practices (1) will only arise where the law, rule, or regulation "is no more burdensome" than compliance with federal laws covering the same issue and corresponding regulations issued by either the ICC or the U.S. Secretary of Transportation, and (2) will only apply to a carrier "upon request of such carrier." [Section 601(h)(3)(B).] Therefore, the language of Section 601 reflects that its preemptive effect was not intended to be all-encompassing

The legislative history of Section 601 supports a similar conclusion. According to the Conference Report, its passage was not designed to preempt all state regulation of motor carriage. Rather, it was intended only to "level the playing field between air carriers on the one hand and motor carriers on the other with respect to *economic* trucking regulation." (Conference Report, p. 82) [Emphasis added.] Specifically, Congress sought to eliminate the substantial competitive advantage given to air

carriers like Federal Express Corporation over traditional motor carriers like UPS as a result of *Federal Express Corp v California Public Utilities Comm*, 936 F2d 1075 (CA 9, 1991), cert den ___ US ___ (1992).[7] The drafters' intent to achieve this result while limiting the breadth of Section 601's preemptive effect can be discerned from page 85 of the Conference Report, where it is noted that:

> "New subsection (h)(2) emphasizes that *State authority to regulate safety, financial fitness and insurance,* transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers *is unchanged* since State regulation in those areas is not a price, route or service and thus is unaffected." [Emphasis added.]

The Conference Report goes on to disclose that, in return for an agreement by the American Trucking Association (ATA) to withdraw its opposition to the FAA Act, Congress endeavored to structure Section 601 in a way that would "allow regulatory protection to continue for non-economic factors, such as liability rules, antitrust immunity to publish documents, insurance, safety, leasing and cargo credit rules." (Conference Report, p. 88.)

Based on Section 601's wording and legislative history, the Commission concludes that it preempts only those provisions of the Act and the Rules relating to

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[7] In that case, Federal Express challenged the California Commission's authority to regulate its motor carrier operations. As noted on page 87 of the Conference Report, the Court ruled that California's intrastate economic regulation of motor carriers did not apply to Federal Express because it was preempted by the Airline Deregulation Act of 1978.

price, route, and service. In reaching this conclusion, the Commission specifically rejects Central's argument that, because the primary focus of the Act has always been on economic regulation, no basis exists for continuing state regulation of motor carriage. The Commission reaches this conclusion for two reasons. First, Section 601 does not require that, to avoid preemption, safety regulation must be the primary focus of any state statute regulating motor carriage. Second, as correctly noted by the Staff, safety concerns occupy at least co-equal status with the economic regulation found in the Act. For example: (1) the first clause of the title states that it is "An act to promote safety upon and conserve the use [sic] public highways of the state;" (2) MCL 475.2 proclaims, in pertinent part, that "It is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the Commission the power to . . . protect the safety and welfare of the traveling and shipping public in their use of the highways;" and (3) MCL 476.5 requires that, to receive a certificate of authority, a prospective motor carrier must show that it is fit – which is defined as being safe, suitable, and financially responsible[8] – and that its vehicles "may be operated safely upon the public highways."

Similarly, the Commission does not find persuasive Central's claim that, by using the phrase "motor vehicles" instead of "motor carriers" in portions of Section 601(h)(2)(A), Congress intended to strip state regulatory commissions of their power to address safety issues and to limit the oversight of these issues to law enforcement

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[8] See MCL 475.1(p).

agencies. At the federal level, the definition found at 49 USC 10102(13) shows that the phrase "motor carriers" refers only to common and contract motor carriers. In contrast, by reading 49 USC 10102(17) in conjunction with 49 USC 10102(16) and 49 USC 10102(26), it appears that the phrase "motor vehicles" extends to private motor carriers as well. Congress' use of the broader term thus likely arose from a recognition that several state commissions regulate private carriers, in addition to common and contract carriers, at least with regard to safety. This fact, when coupled with Section 601's legislative history, supports rejection of Central's claim.

For all of these reasons, the Commission finds that Section 601 preempts only those portions of the Act and the Rules relating to price, route, and service. Having found that it continues to possess substantial regulatory authority over intrastate motor carriage, the Commission must next address the extent of that authority as it pertains to issues raised by the parties.

Regulation of Household Goods Movers

As noted earlier, the MMWA contends that neither the Act nor the Rules are in any way preempted with regard to household goods movers. Moreover, it points out that the only testimony offered on this issue, from Staff witness Lonergan and from the MMWA's witness, David Corrigan, supports this contention. The MMWA therefore asserts that the Act and the Rules remain in effect and must be applied in their entirety to the movement of household goods. The Commission agrees.

Section 601(h)(2)(B) specifically states that the preemptive effect "does not apply to the transportation of household goods." Furthermore, in assembling the Conference Report, Congress noted that existing state regulatory authority over this segment of the industry was intended to be "unchanged" and "unaffected" by Section 601. (Conference Report, p. 85.) Thus, in the absence of any arguments to the contrary, the Commission finds that it must continue to apply all provisions of both the Act and the Rules to household goods movers.

The Certification Process

In contrast to the lack of conflict concerning the effect of Section 601 on household goods movers, two disputes have arisen regarding the future of the Commission's motor carrier certification process. The first concerns whether Section 601 preempts the certification process in its entirety. The second relates to the narrower issue of whether, assuming the process is continued, Section 601 precludes the filing of protests or petitions to intervene.

The Staff contends that, based on the wording and legislative history of Section 601, the Commission is not preempted from issuing certificates of authority to intrastate motor carriers. Therefore, the Staff asserts, the Commission retains its duty under the Act to regulate the activities of motor carriers (and thus promote safety upon, and conserve the use of, the state's public roadways) by issuing certificates of authority only to qualified carriers. It further asserts that, with certain modifications, the existing procedures for granting and renewing those certificates can be made to comport with the preemption

of state regulation of prices, routes, and services. Specifically, by adopting Mr. Lonergan's proposed changes to MCL 476.5, 476.6, 476.7, 476.7a, 476.8, and 477.1 through 477.12, as well as related provisions of the Rules, the Staff claims that the certification process can be converted to one that focuses solely on safety, fitness, and adequacy of insurance.[9] The Staff's position is supported, to varying degrees, by parties such as the AAMA and UPS.

In contrast, the parties who claim that Section 601 preempts all provisions of the Act and the Rules, such as Central, likewise assert that it precludes any future application of the Commission's certification process. This is true, they contend, even if the process is restricted to one that focuses exclusively on issues of safety and fitness. In support of this assertion, Central argues that federal court rulings (including the *Hodges* decision cited by the Staff) have interpreted phrases like "price route, and service" so broadly that they subsume many issues one might otherwise consider safety- or fitness-related. For example, it notes that the Court in *Hodges, supra,* held that similar language in the Airline Deregulation Act of 1978 preempted the state law claims of a passenger injured

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[9] Specifically, the Staff's proposal would eliminate the need for an applicant to (1) convince the Commission, through testimony of shipper support witnesses, that its proposed service would serve a required public purpose, (2) show that granting the application would not create excess service, and (3) prove that it is both willing and able to provide service commensurate with the full extent of the certificate sought. In addition, the proposal would allow motor carriers to have all existing restrictions removed from their intrastate authorities in the course of the annual renewal process.

when a case of rum fell out of an overhead compartment. According to the Court, the level of safety provided to the plaintiff in that case was within the realm of "'services" offered by the airline, and thus beyond the state's control. Claiming that the safety component of the Act "'bears the same relation to 'service' as does the safety of passengers injured by cases of rum falling from overhead bins," Central contends that the Commission's certification function is preempted in its entirety.

The Commission does not find Central's argument persuasive for three reasons. First, the legislative history of Section 601 indicates that Congress did not intend to preempt motor carrier certification procedures like those envisioned by the Staff. In this regard, the Conference Report specifically asserts that Section 601 would not hinder "the ability of a State to issue a certificate or other documentation (in written or electronic form) demonstrating that the carrier complies with State requirements." (Conference Report, p. 85.) Second, *Hodges* can be easily distinguished on the grounds that the plaintiff in that case was a passenger who was, by definition, taking service from the airline when injured. In contrast, the Commission's directive to promote safety upon the public highways is designed to protect other drivers, rather than shippers who avail themselves of a motor carrier's service. Third, the drafters of Section 601 expressly indicated that "State authority to regulate safety, financial fitness and insurance" is not preempted "since State regulation in those areas is not a price, route or service." (Conference Report, p. 85.)

For these reasons, the Commission finds that it should adopt the Staff's proposal to retain the Act's certification process by simply treating as preempted all consideration of price, route, and service found in Article II of the Act. The Commission recognizes that, by doing this, all distinctions between contract and common carriage become unnecessary. Therefore, it also finds that all provisions in Article III of the Act, as well as the related portions of the Rules, should be treated as preempted, and that all intrastate motor carriers (except for household goods movers) should be allowed to exchange their existing common and contract carriage authorities for a single, unrestricted certificate.

Having concluded that the streamlined certification process proposed by the Staff is not preempted, the Commission must now decide whether that is also true of the right to file protests or petitions to intervene. According to the AAMA, protestants and intervenors who attain party status pursuant to MCL 476.5(3) and 476.5(4), respectively, are generally competing motor carriers seeking to challenge the application on the basis of the existence of a required public purpose or the potential for excess service. The AAMA thus concludes that, because these issues relate to economic regulation, Section 601 preempts all provisions in the Act and the Rules regarding protests and interventions. Morgan disagrees with the AAMA's conclusion. According to it, competing motor carriers are often in the best position to bring concerns regarding the applicant's safety and fitness to the Commission's attention. Thus, Morgan contends that MCL 476.5(3) and 476.5(4) are not preempted.

The Commission agrees with Morgan. Although in the past protestants and intervenors often focused on issues relating to need or excess service, they also provided insight regarding other aspects of an applicant's operations. Moreover, by adopting the Staff's position regarding the retention of a streamlined certification process, the scope of all future protests or interventions will be limited to non-economic issues like safety, fitness, and adequacy of insurance. The Commission therefore finds that, although protests or applications for leave to intervene based on economic issues are preempted, those based on non-economic issues are not.

Assessment of Annual Registration Fees

Morgan and MOOD contend that, because economic regulation of motor carriers is preempted by Section 601, staffing levels of the State Police and the Motor Carrier Division can be significantly reduced. They therefore assert that, because much of the state's funding for motor carrier regulation comes from the annual registration fee found in MCL 478.2, this portion of the Act should be [sic] either be disregarded or abolished. Morgan goes on to assert that, because the State Police use some of these fees to enforce safety provisions that also apply to exempt and private carriers, the fact that MCL 478.2 applies exclusively to regulated motor carriers conflicts with the concept of equal protection.

A contrary position is taken by both the AAMA and the Staff. According to the AAMA, because Michigan's motor carrier certification procedure is not preempted, all references to application and registration fees in Article

IV of the Act must likewise remain in effect. It further contends that the exclusive power to amend those fee provisions is "within the province of the Legislature inasmuch as the fees are set by statute." (AAMA's brief, p. 9.) The Staff agrees with both of these contentions. In addition, it points out that the Act does not require that revenue received under MCL 478.2 be used exclusively for economic regulation. Thus, that provision cannot be considered preempted by Section 601.

The Commission agrees with the AAMA and the Staff. As already discussed in detail, the preemptive effect of Section 601 extends only to issues of price, route, and service. Neither the language of Section 601 nor the Conference Report imply that fees imposed by a state's existing regulatory structure might fall within that relatively narrow range of issues. Thus, application of the annual registration fee required by MCL 478.2 is not preempted.

Turning to the question of whether collection of this fee should nevertheless be suspended, or whether the amount of the fee should be reduced, the Commission is unable to provide the relief requested by Morgan and MOOD. Motor carrier fees are set by statute. Thus, any steps by the Commission to revise either the level or scope would constitute an unsupported intrusion into an area reserved for the Legislature. Moreover, even if the Commission were authorized to make those changes, the record provides an inadequate basis for doing so.

Finally, it should be noted that a decision regarding whether the Act (and thus the registration fee imposed by MCL 478.2) should apply to some trucking operations

and not to others is also an area falling within the exclusive province of the Legislature. Thus, any attempts to address Morgan's equal protection claims are beyond the powers granted to the Commission. For all of these reasons, the Commission finds that motor carriers should continue following the fee schedule set forth in Article IV of the Act, including payment of the annual registration fee described in MCL 478.2.

Jointly-Established Rates and Classifications

None of the parties object to the Staff's conclusion that Section 601 preempts the authority of the Commission to oversee and approve collectively-established single-line rates.[10] However, a dispute has arisen regarding its conclusion that Section 601 does not preempt the Commission's provision of antitrust immunity (pursuant to MCL 479.6b) with regard to the establishment of joint-line rates.

ABC contends that the Staff's conclusion regarding joint-line rates must be rejected because (1) MCL 479.6b requires tariff filings, thus making it more burdensome than compliance with federal regulations concerning the same issue, and (2) the Supreme Court's decision in *Cantor* precludes the Commission from providing the required "state action" antitrust immunity.

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[10] Therefore, although shown on the revised copy of the Act (attached to this order as Exhibit A) as having been retained for other purposes, MCL 479.6b is preempted as it relates to collectively-established single-line rates after January 1, 1995.

The MIB disagrees with ABC's contentions. According to it, the system envisioned by the Staff is no more burdensome than the ICC's. The MIB goes on to assert that, notwithstanding *Cantor, supra,* the Supreme Court's decision in the *Southern Motor Carrier* case recognizes that states may grant antitrust immunity to motor carriers who collectively-establish their rates. The MIB therefore claims that the Staff's proposal should be adopted, but with three changes or clarifications. First, it contends that the Staff's proposed deletions to the Act should not include the clause found at MCL 475.2(n) and the last sentence of MCL 479.6b(1). Second, the MIB contends that even if MCL 476.6, 476.7, and 476.7a are preempted, as suggested by the Staff, it must be noted that such preemption only extends to collectively-established single-line rates. Third, it contends that Parts 10 and 12 of the Rules should continue to apply to motor carriers that engage in collective ratemaking for joint-line rates.

As can be seen from these parties' positions, one of the key issues to be decided is whether the collective ratemaking process envisioned by the Staff (and conducted pursuant to the Act and the Rules) is more burdensome than that imposed by the ICC. Nevertheless, the parties provided less evidence and argument than the Commission expected – and far less than it would have liked – concerning this and other issues relating to collectively-established joint-line rates. The Commission therefore finds that the record should be reopened and that additional testimony and briefs should be submitted by all interested parties regarding the Commission's ability to oversee and approve such rates.

To ensure that questions regarding joint-line rates are resolved as expeditiously as possible, the following schedule is established:

Filing of testimony and exhibits	January 25, 1995
Filing of rebuttal testimony and exhibits	February 1, 1995
Cross-examination of all witnesses commences	February 8, 1995
Filing of briefs	February 22, 1995
Filing of reply briefs	March 1, 1995

As stated in the September 8, 1994 order initiating this case, the Commission will read the reopened record, thus dispensing with the need for a proposal for decision and exceptions. To further expedite the proceedings, any discovery undertaken regarding the issues covered by this limited reopening shall require a response time of no more than five days.

Until the Commission makes a determination regarding whether its regulation of collectively-established joint-line rates is preempted by Section 601, both MCL 475.2(n) and 479.6b(1) will remain in effect. Similarly, MCL 476.6, 476.7, and 476.7a, as well as Parts 10 and 12 of the Rules, will (at least temporarily) be considered preempted only with respect to single-line rates.[11]

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[11] However, preemption of Commission control over collectively-established single-line rates requires only the elimination of two words in the caption to Part 10. This is reflected on the rules attached to the order as Exhibit B.

A related issue is raised by the NMFTA. According to it, section 601(h)(3)(iv) exempts collectively-established freight classifications from preemption. The NMFTA therefore asserts that the Commission remains authorized, and should continue, to provide antitrust immunity for such classifications.

Prior to the enactment of Section 601, the Commission had long provided for the use of collectively-established classifications. Moreover, the language of MCL 479.6b indicates that it applies to jointly-considered rates and classifications alike. [See MCL 479.6a(1).] Thus, because these issues are so closely related, the Commission finds that additional testimony and briefs should also be submitted regarding Section 601's effect on its ability to continue providing antitrust immunity for freight classifications like those proposed by the NMFTA. As with any future discussions regarding collectively-established joint-line rates, this additional information regarding classifications should, among other things, include an assessment of whether the process currently required by the Act and the Rules is more burdensome than the ICC's. Furthermore, the Commission finds that submission of this information must be done in accordance with the above-mentioned schedule and that regulation of freight classifications will remain unchanged pending a final determination of the Commission regarding preemption of this area.

Leasing Requirements Under MCL 479.10a

One of the most contentious issues involves the motor carrier leasing requirements found in MCL 479.10a.

Of particular interest to the parties are MCL 479.10a(1), which requires – among other things – that leases have a term of at least 30 days, and MCL 479.10a(6), which requires that leased vehicles be driven by employees of the motor carrier. According to Kubach, Central, and several other parties, these provisions constitute the type of state-imposed economic regulation that Section 601 was intended to preempt. In contrast, the Teamsters and the Staff assert that MCL 479.10a is beyond the preemptive scope of Section 601 and that its continued enforcement will help ensure that the use of leased vehicles does not result in reduced adherence to the Commission's standards regarding safety, fitness, and adequacy of insurance.

Once again, the Commission finds that additional information is necessary for a full and fair determination of this issue. For example, interested parties should submit detailed testimony and arguments regarding, among other things, the legislative background of MCL 479.10a and any of its amendments, as well as whether the leasing requirements are related to prices, routes, and services. This should be accomplished in the context of the limited reopening discussed above.[12]

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[12] Thus, until the Commission issues its final determination regarding whether the Act's leasing requirements are preempted by Section 601, MCL 479.10a will remain in effect.

Miscellaneous Issues

Four additional issues have arisen that deserve specific mention. First, R & L contends that, pursuant to Section 601, the Commission is preempted from commencing or continuing activities seeking to enforce provisions of the Act related to routes or services. It therefore asks the Commission to suspend all investigations and complaint proceedings relating to those issues. In particular, it appears that R & L seeks immediate dismissal of the complaint filed against it in Case no. T-1270. Central opposes this request, at least with regard to violations of the Act occurring prior to January 1, 1995.

The Commission agrees with Central that, pursuant to the general savings statutes enacted by both Congress (1 USC 109) and Michigan's Legislature (MCL 8.4a), its authority to hold motor carriers accountable for past violations of the Act has not been preempted.[13] Moreover, while requests for certain types of enforcement may not make sense after Section 601 takes effect, such requests should be addressed on a case-by-case basis. The Commission therefore finds that R & L's request for a blanket dismissal of all investigations and complaint proceedings concerning alleged route and service violations must be denied. It further finds that all issues regarding the effect of Section 601 on the on-going complaint filed against R & L should be reserved for decision in Case No. T-1270.

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[13] Relying on almost identical language, these statutes provide that a law's repeal or amendment does not serve to release or extinguish any penalty or liability incurred under its previous form, unless expressly provided for in the new act. No such express provision was included in Section 601.

Second, the AAMA points out that, after January 1, 1995, it will become much easier for an applicant to obtain motor carrier authority under the Act. Specifically, it contends that once the applicant complies with all remaining safety and insurance requirements, a certificate would be granted expeditiously. Thus, the AAMA asserts, it makes no sense to retain the transfer provisions found in MCL 479.5 and 479.6(2). The Commission disagrees.

AAMA's proposal erroneously assumes that the Commission's ability to entertain protests or petitions for leave to intervene is preempted by Section 601. However, as discussed previously, protests and interventions will continue to be allowed as long as they pertain to issues of safety, fitness, and insurance. Thus, although adoption of a streamlined certification process should result in most applications being granted in an expeditious manner, receipt of a certificate may be delayed in cases where protestants or intervenors raise valid concerns regarding safety, fitness, and adequacy of insurance. Furthermore, certain situations exist (such as the purchase of a motor carrier's entire operation, including all goodwill associated with its name) in which the parties may find a transfer preferable to the creation of a new motor carrier authority. Therefore, although there will likely be a significant drop in the number of applications for transfers once Section 601 makes effect, MCL 479.5 and 479.6(2) are not preempted.

Third, the AAMA requests that the Commission eliminate all restrictions on a company's ability to perform for-hire transportation for an affiliate, which are set forth in MCL 479.2(1)(n)(i) through 479.2(1)(n)(v). According to

it, such action is warranted because none of these requirements directly concerns issues of safety and insurance. The Commission finds that this request must also be denied.

MCL 479.2 provides a list of all classes of carriers that are exempt from the Act. Thus, rather than imposing some form of economic regulation (as the AAMA apparently believes), it has the opposite effect. Moreover, the decision to add or delete a class from this list rests exclusively with the Legislature. Therefore, because the provisions found at MCL 479.2(1)(n)(i) through 479.2(1)(n)(v) are not preempted, and because the Commission lacks independent authority to eliminate them, they must be retained.

Fourth and finally, the AAMA contends that provisions in the Act concerning annual reports (MCL 476.10), vehicle identification (MCL 479.8), and the examination of motor carrier books and records (MCL 479.11) pertain exclusively to the economic regulation of intrastate motor carriers. It therefore asserts that these provision [sic] should be considered preempted as of January 1, 1995. Again, the Commission disagrees.

According to Mr. Lonergan, annual reports like those authorized in MCL 476.10 could be used to obtain a list of each motor carrier's accidents during the previous year, thus alerting the Commission to any carriers that have a higher-than-normal frequency of accidents. (2 Tr. 307.) Similarly, the Commission's ability to review a motor carrier's financial records for the preceding three years, as provided for in MCL 479.11, could prove especially important in cases where its ability to self-insure is in

question. (2 Tr. 318.) Finally, by authorizing the Commission to revoke the identification provided to each of a carrier's vehicles, MCL 479.8 provides important enforcement powers. Specifically, Mr. Lonergan noted that this provision could be used to ensure that a vehicle's insurance is not allowed to lapse. (2 Tr. 99.) Thus, because these provisions can assist the Commission in its regulation of safety, fitness, and adequacy of insurance, they are not preempted.

IV.

CONCLUSION

As stated at the outset, the goal of this proceeding is to express the Commission's view regarding which sections of the Act and the Rules have been preempted by Section 601. In doing so, the Commission acknowledges that it lacks the power to independently revise the Act and that the Rules must ultimately be amended by the Commission to conform to changes in federal and state law. Thus, by issuing this order, the Commission endeavors only to provide guidance to motor carriers, shippers, and the public regarding how ti expects to conduct motor carrier regulation in Michigan following the effective date of Section 601. All parties remain free to argue for a different interpretation of the effect of Section 601 before the Commission, the courts, and the Legislature.

To assist interested parties in determining precisely which provisions of the Act and the Rules will continue to be enforced, at least until they are revised by the Legislature, the Commission has attached to the order

marked-up versions of each, designated as Exhibit A and Exhibit B, respectively. As previously discussed, none of the changes reflected on these exhibits apply to household goods movers. Similarly, MCL 476.6, 476.7, and 476.7a, as well as Parts 10 and 12 of the Rules, are preempted only with respect to collectively-established single-line rates, at least until the Commission issues a further order following completion of the limited reopening discussed earlier.

The Commission FINDS that:

a. Jurisdiction its pursuant to 1933 PA 254, as amended, MCL 475.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, R 460.17101 et seq.

b. Title VI, Section 601 of the Federal Aviation Administration Authorization Act of 1994 preempts Michigan's Motor Carrier act, 1933 PA 254, as amended, MCL 475.1 et seq., only to the extent described in this order and reflected on the attachment designated as Exhibit A.

c. Title VI, Section 601 of the Federal Aviation Administration Authorization Act of 1994 likewise preempts the Motor Carrier Rules, R 460.18101 through 460.19301 of the Michigan Administrative Code, only to the extent described in this order and reflected on the attachment designated as Exhibit B.

d. The Staff should issue to each motor carrier that currently holds intrastate authority, except for those holding authority to transport household goods, a single,

unrestricted certificate to replace the motor carrier's existing summary of authority.

e. The record should be reopened, the case should be remanded to the ALJ, and additional evidence and arguments should be received (on an expedited basis and in accordance with the schedule set forth in this order) regarding collectively-established joint-line rates, freight classifications, and the leasing requirements found in MCL 479.10a.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(SEAL)

/s/ Ronald E. Russell
Commissioner

/s/ John L. O'Donnell
Commissioner

By its action of January 11, 1995.

/s/ Dorothy Wideman
Its Executive Secretary

APPENDIX D

CONSTITUTION OF THE UNITED STATES

ARTICLE VI

Debts; supremacy; oath

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

APPENDIX E

49 C.F.R. § 14501. Federal authority over intrastate transportation

(a) Motor carriers of passengers. – No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route or relating to the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This subsection shall not apply to intrastate commuter bus operations.

(b) Freight forwarders and brokers –

(1) General rule. – Subject to paragraph (2) of this subsection, no State or political subdivision thereof an no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

(2) Continuation of Hawaii's authority. – Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

(c) Motor carriers of property. –

(1) General rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. – Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision related to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices. –

(A) Continuation. – Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to –

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements. – A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if –

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) **Election.** – Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) **Nonapplicability to Hawaii.** – This subsection shall not apply with respect to the State of Hawaii.

(Added Pub.L. 104-88, Title I, § 103, Dec. 29, 1995, 109 Stat. 899.)

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OCT 27 1998
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SUPREME COURT, U.S.

No. 98-533
In the Supreme Court of the United States
October Term, 1998

CENTRAL TRANSPORT, INC. and
UNIVERSAL AM-CAN, LTD.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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36 pp

QUESTION PRESENTED

Whether section 601 of the Federal Aviation Administration Authorization Act of 1994, which preempted state economic regulation of motor carriers as to price, route and services but which expressly excepted from that preemption state regulation of matters pertaining to safety and insurance, preempted the assessment of motor carriers' fees to fund the non-preempted regulatory activities of the Michigan Public Service Commission?

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i

INDEX OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

ARGUMENT 6

A. THE MICHIGAN COURT OF APPEALS PROPERLY AFFIRMED THE MPSC'S DECISION THAT NON-ECONOMIC STATE REGULATION OF MOTOR CARRIERS WAS NOT PREEMPTED BY FEDERAL LAW 7

1. Federal Preemption Is Determined By Congressional Intent, And Is Limited And Strictly Construed With Respect To Statutes Enacted Under The State's Police Powers 7

2. The Express Language Of FAAAA Section 601 And Its Legislative History Establish That Congress Did Not Intend To Preempt Non-Economic State Regulation Of Intrastate Transportation Of Property By Motor Carriers, Including Safety and Fitness Regulation, And The Issuance Of Certificates And Collection Of Fees Related Exclusively To Such Non-Preempted Regulation 9

3. The Michigan Court of Appeals Correctly Held That FAAAA Section 601 Does Not Preempt The MMCA Fee Provisions 14

4. A Major Purpose Of The MMCA Extends To Safety Regulation, Which Has Been Preserved By FAAAA Section 601 17

CONCLUSION 20

INDEX OF AUTHORITIES

Pages

CASES

Cloverleaf Butter Co v Patterson,
315 U.S. 148; 62 S. Ct. 491;
86 L. Ed. 754 (1942) 8

Florida Lime & Avocado Growers v Paul,
373 U.S. 132; 83 S. Ct. 1210;
10 L. Ed. 2d 248 (1963) 8

Fort Halifax Packing Co v Coyne,
482 U.S. 1; 107 S. Ct. 2211;
96 L. Ed. 2d (1987) 8

Hillsborough County v Automated Medical Laboratories,
471 U.S. 707; 105 S. Ct. 2371;
85 L. Ed. 2d 714 (1985)..... 8

Interstate Circuit, Inc. v Dallas,
390 U.S. 676; 88 S. Ct. 1298;
20 L. Ed. 2d 225..... 1

Louisiana Public Service Comm. v Federal Communications Comm,
476 U.S. 355; 106 S. Ct. 1890;
90 L. Ed. 2d 369 (1986) 7

Mabee v White Plains Publishing Co,
327 U.S. 178; 66 S. Ct. 511;
90 L. Ed. 607 (1946) 8

Morales v TransWorld Airlines,
504 U.S. 374; 112 S. Ct. 2031;
119 L. Ed. 2d 157 (1992) 12-13

STATUTES

1963 P.A. 181,
M.C.L. 480.11, *et seq.*; M.S.A. 9.1666(1a) *et seq.*
(Motor Carrier Safety Act) 18-19

28 U.S.C. 1257(a) 1

Airline Deregulation Act of 1978 (ADA),
49 U.S.C. 41713 12

Federal Aviation Administration Authorization Act of
1994, ("Section 601") 49 U.S.C. 14501(c) ..... passim

M.C.L. 476.3; M.S.A. 22.536 18

M.C.L. 478.1, 478.2(1) and 478.2(2) 14

Michigan Motor Carrier Act ("MMCA"),
M.C.L. 475.1 *et seq.*; M.S.A. 22.531 *et seq* ..... passim

CONSTITUTION

U.S. Const., Art. VI., cl. 2 (Supremacy Clause) 1

OTHER

House Conference Report No. 103-677,
page 84, reprinted in 1994 U.S.C.C.A.N. 1756 ... 11-14

OPINIONS BELOW

The order of the Michigan Supreme Court denying leave to appeal is reported at 458 Mich. 852 (Pet. App. 30-31). The opinion of the Michigan Court of Appeals affirming in part, and reversing in part, the decision of the Michigan Public Service Commission is reported at 223 Mich. App. 288, 566 N.W.2d 299 (1997) (Pet. App. 1-30). The decision of the Michigan Public Service Commission is unreported (Pet. App. 32-78).

JURISDICTION

The order of the Michigan Supreme Court denying leave to appeal was entered on June 29, 1998. The petition for a writ of certiorari was filed September 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). Although the petition incorrectly states that it seeks a writ of certiorari to the Michigan Supreme Court, because that court denied discretionary review (Michigan Court Rule 7.301(A)(2)) it is the judgment of the Michigan Court of Appeals which is reviewable under 28 USC § 1257(a). *Interstate Circuit, Inc. v Dallas*, 390 US 676, 678 n.1 (1968); Stern, Gressman, Shapiro & Geller, Supreme Court Practice, § 3.12, p. 115 (7th ed. 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const., Art. VI., cl. 2 is set forth at Pet. App. 79. Section 601 of the Federal Aviation Administration Authorization Act of 1994, ("Section 601") 49 U.S.C. 14501(c) is set forth at Pet. App. 80-83.

STATEMENT

1. On August 23, 1994, President Clinton signed into law the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). Section 601 of the FAAAA preempted state economic regulation of motor carriers related to price, route or services. Contrary to Petitioners' statement of the issue, Section 601 did not prohibit "virtually all state regulation of intrastate motor carriers." Instead, that section effected only a partial preemption of state law, which is evidenced by Section 601's (49 U.S.C. 14501(c)(2)) description of matters not covered, wherein Congress stated that the preemption:

> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and
>
> (B) does not apply to the transportation of household goods.

2. On September 8, 1994, the Michigan Public Service Commission ("MPSC") issued an order, with notice to all interested parties including Petitioners, initiating a contested case proceeding (MPSC Case No. T-1273) to examine the effect of Section 601 of the FAAAA on the Michigan Motor Carrier Act ("MMCA"), M.C.L. 475. 1 *et seq.* and rules promulgated thereunder. In that September 8, 1998 order, the MPSC indicated that following the submission of evidence and testimony, it would issue a decision determining which sections of the MMCA and its rules had been preempted and which had not. The MPSC further stated the contested case proceeding was not intended to address the FAAAA's constitutionality but rather was intended to provide a framework for motor carriers to follow pending anticipated

action by the Michigan Legislature to conform the MMCA with the FAAAA.

3. On January 11, 1995, following contested case hearings and the submission of briefs by interested parties, the MPSC issued its opinion and order in MPSC Case No. T-1273 (Pet. App. 32-78),[1] identifying those provisions of the MMCA and rules promulgated thereunder, that were preempted by Section 601 of the FAAAA as well as those sections that were not preempted by Section 601 and which remained binding on motor carriers.

4. In its January 11, 1995 Opinion and Order, the MPSC found that despite some parties' assertions to the contrary, the wording of Section 601 stops far short of precluding the state regulation of all aspects of motor carriage. Pet. App. 57. The MPSC's order noted, for example, the heading to Section 601 which reads "Preemption of State Economic Regulation of Motor Carriers," and stated:

> This implies that, of the range of areas presently covered by state regulation, economic regulation (rather than regulation of safety, fitness, insurance, etc.) was singled out by Congress for at least partial preemption. Such an implication is further supported by the "General Rule" set forth in Section 601(h)(1), which states only that states "may not enact or enforce a law, regulation, or other provision . . . *related to a price, route, or service*" of any for-hire or private motor carrier. (Emphasis added.) Issues involving prices, routes, and

[1] The MPSC's January 11, 1995 Opinion is reprinted in the Petitioners' Appendix at pages 32-78. However, the Petitioners' Appendix does not contain Exhibit A and Exhibit B that were attached to the MPSC's order which the MPSC refers to in its order at Pet. App. 77. Exhibits A and B comprise 182 pages and sets forth the text of all Michigan statutes and regulations pertaining to motor carriers. In each Exhibit, the MPSC did a section-by-section analysis of those rules and regulations, carefully lining out those sections that were preempted by Section 601 of the FAAAA.

> services have long been considered by the motor carrier industry to fall within the definition of economic regulation.

Pet. App. 57. The MPSC further found that Section 601 itself provided a list of matters not covered by the preemption. The MPSC stated that the finding of a partial preemption was further supported by the FAAAA's legislative history. Pet. App. 58-59. The MPSC thus concluded:

> Based on Section 601's wording and legislative history, the Commission concludes that it preempts only those provisions of the Act and the Rules relating to price, route, and service. In reaching this conclusion, the Commission specifically rejects Central's argument that, because the primary focus of the Act has always been on economic regulation, no basis exists for continuing state regulation of motor carriage. The Commission reaches this conclusion for two reasons. First, Section 601 does not require that, to avoid preemption, safety regulation must be the primary focus of any state statute regulating motor carriage. Second, as correctly noted by the Staff, safety concerns occupy at least co-equal status with the economic regulation found in the Act.

5. Having determined that Congress intended only a partial preemption of state motor carrier laws, the MPSC's January 11, 1995 Opinion and Order then addressed whether specific areas of state motor carrier regulation were preempted. They include: regulation of household goods movers (Pet. App. 61-62); the certification process (Pet. App. 62-66); the assessment of annual registration fees (Pet. App. 66-68); jointly-established rates and classifications (Pet. App. 68-71); leasing requirements under M.C.L. (Pet. App. 71-72), and; other miscellaneous issues (Pet. App. 73-76).

With regards to the assessment of annual registration fees, the MPSC found that they were not preempted by Section 601 of the FAAAA, stating:

> The Commission agrees with the AAMA and the Staff. As already discussed in detail, the preemptive effect of Section 601 extends only to issues of price, route, and service. Neither the language of Section 601 nor the Conference Report imply that fees imposed by a state's existing regulatory structure might fall within that relatively narrow range of issues. Thus, application of the annual registration fee required by MCL 478.2 is not preempted.

Pet. App. 67. Importantly, the MPSC's opinion also notes that the MMCA does not require that revenue received (i.e. from fees) under that law be used exclusively for economic reasons. *Id.* Thus, the fees received can be used only to fund non-preempted motor carrier regulatory activities performed by the MPSC.

In response to the argument that the motor carrier fees should nonetheless be suspended or reduced the Commission reasoned there was an insufficient legal or factual basis for doing so. First, the MPSC noted that the amount of the fees was set by statute. Because of this, the MPSC concluded that it could not lawfully intrude in this area which was reserved to the Legislature. Pet. App. 67. Secondly, the Commission determined that even if it was authorized to make such a change, "the record provides an inadequate basis for doing so." Pet. App. 67.

6. On appeal, the Michigan Court of Appeals upheld the MPSC's opinion and order with respect to fees, finding that it was not only in keeping with Section 601's partial preemption but also supported by the record, as follows:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL

> 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. *In fact, because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation.* (Emphasis added.)

Pet. App. 18-19. Petitioners then sought leave to appeal the decision of the Michigan Court of Appeals to the Michigan Supreme Court, which unanimously denied in an order dated June 29, 1998.

7. The MPSC has *not* enforced any provision of the MMCA or its Rules which the MPSC found preempted by Section 601 in its January 11, 1995 order. However, the MPSC has continued to enforce those non-preempted provisions of the MMCA and its rules relating to such matters as safety, fitness, etc. Furthermore, the MPSC has also utilized the fees collected *only* for such non-preempted regulation conducted as of January 1, 1995.

ARGUMENT

Petitioners contend that the Michigan Court of Appeals erred in finding that Section 601 of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. 14501(c) did not result in the preemption of virtually all state motor carrier laws. The claim is without merit. As the Michigan Court of Appeals correctly recognized, the FAAAA, by its own terms, does not support the broad sweep of federal motor carrier preemption, urged by the Petitioners. Section 601 expressly excepts from its preemptive effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of

insurance requirements, and regulation of the transportation of household goods.

The Petitioners erroneously contend that the sole focus of the Michigan Motor Carrier Act ("MMCA"), M.C.L. 475.1 *et seq.*; M.S.A. 22.531 *et seq.* is the economic regulation of competition. This is not true since the MMCA, from its very inception, has had as a dual purpose to "protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways." M.C.L. 475.2; M.S.A. 22.532. Because the Petitioners' claim lacks merit and because this case does not involve an important question of federal law that has not been, but should be, settled by this Court, or has been decided in a way that conflicts with relevant decisions of this Court, the petition for writ of certiorari should be denied.

A. THE MICHIGAN COURT OF APPEALS PROPERLY AFFIRMED THE MPSC'S DECISION THAT NON-ECONOMIC STATE REGULATION OF MOTOR CARRIERS WAS NOT PREEMPTED BY FEDERAL LAW.

1. Federal Preemption Is Determined By Congressional Intent, And Is Limited And Strictly Construed With Respect To Statutes Enacted Under The State's Police Powers.

Congressional intent determines whether federal law preempts state law. "[T]he critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm. v Federal Communications Comm.*, 476 U.S. 355, 369 (1986) (*"Louisiana PSC"*). This Court in *Louisiana PSC* identified when Congress can be understood to have preempted state law:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law..., when there is outright or actual conflict between federal and state law..., where compliance with both federal and state is

> in effect physically impossible..., where there is implicit in federal law a barrier to state regulation..., where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law..., or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.... (Citations omitted).

476 U.S. at 368-369.

Petitioners erroneously argue that Congress has occupied virtually the entire field of regulation. However, federal occupation of a field will not be lightly inferred:

> The principle to be derived from [Supreme Court] decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained.

Florida Lime & Avocado Growers v Paul, 373 U.S. 132, 147 (1963).

Moreover, preemption of matters "within the traditional police power of the State should not be lightly inferred." *Fort Halifax Packing Co. v Coyne*, 482 U.S. 1, 21 (1987). A federal statute will be read to supersede a State's historic powers only if this is "the clear and manifest purpose of Congress." *Hillsborough County v Automated Medical Laboratories, Inc.*, 471 US 707, 715 (1985).

This Court has also recognized that, in exercising its power under the Commerce Clause, "Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field." *Mabee v White Plains Publishing Co.*, 327 U.S. 178, 184 (1946). In *Cloverleaf Butter Co. v Patterson*, 315 U.S. 148, 155 (1942), this Court added

that, where there has only been a partial exercise of the federal government's power over interstate commerce, "the state may legislate freely upon those phases of the commerce which are left unregulated by the nation."

As is evident from its plain language, Congress in Section 601 effected only a *partial* preemption, while expressly *preserving* other state regulation (safety, fitness, etc), which necessarily includes the attendant fees used for such continued regulation. Congress neither sought nor intended to occupy virtually all motor carrier regulation (or to bar continued state regulation in the areas not preempted). The MPSC's decision, as affirmed by the Michigan Court of Appeals, recognized Section 601's preemption, and the Congressional intent *not* to preempt areas relating to safety, fitness, certificates, fees, among others.

2. The Express Language Of FAAAA Section 601 And Its Legislative History Establish That Congress Did Not Intend To Preempt Non-Economic State Regulation Of Intrastate Transportation Of Property By Motor Carriers, Including Safety and Fitness Regulation, And The Issuance Of Certificates And Collection Of Fees Related Exclusively To Such Non-Preempted Regulation.

FAAAA Section 601 provides for only *partial preemption* of traditional state authority to regulate intrastate motor carrier matters, and did not preempt all state regulation of for-hire carriers as Petitioners' claim. By its own terms, Section 601 provides for only *partial* preemption of state regulation, namely, economic regulation "related to a price, route, or service of any motor carrier". Section 601(h) [49 U.S.C. 14501(c)], in pertinent part, states:

> (1) GENERAL RULE. -- Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a

> law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) of this title) or any motor private carrier with respect to the transportation of property.
> (2) MATTERS NOT COVERED.--Paragraph (1)--
> (A) *shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and*
> (B) *does not apply to the transportation of households goods.* (Emphasis added).

Besides the plain language of Section 601's statutory provisions, the legislative history also establishes that only a *partial* preemption was intended by Congress, and not the sweeping preemption that Petitioners suggest. The preemption as stated pertains only to that which is "related to a price, route, or service of any motor carrier." The legislative history further indicates that the specific exemptions from preemption listed in Section 601(h)(2)(A) (e.g., safety, financial fitness, fees, size, weight, etc.) were *not* intended as a specific or exhaustive list, but were meant as examples of the kind of state regulation that remains. In other words, Congress preempted only those matters which are expressly preempted in the FAAAA, and nothing else. In this regard, the House Conference Report No. 103-677, p. 84, reprinted in 1994 U.S.C.C.A.N. 1756 states:

> Paragraph (4)(B) emphasizes that State authority to regulate safety, financial responsibility relating to insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of air carriers and carriers affiliated with a direct

> air carrier through common controlling ownership is unchanged, since State regulation in those areas is not a price, route or service and thus is unaffected. (This provision is identical to the new subsection 11501(h)(2)(A) discussed below.) *This list is not intended to be all inclusive, but merely to specify some of the matters which are not "prices, rates or services" and which are therefore not preempted.* (Emphasis added).

The House Conference Report No. 103-677, reprinted in 1994 U.S.C.C.A.N. 1757 further indicates that those matters which are not a price, rate or service are not preempted, stating as follows:

> New subsection (h)(2) emphasizes that State authority to regulate safety, financial fitness and insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected. This subsection is identical to section 41713(b)(4)(B), described above.

The same House Conference Report also provides compelling evidence that congressional intent is not to preempt the ability of the states to issue statewide certificates of authority applicable to motor carriers to demonstrate their compliance with state and federal laws, or to interfere with tax (or fee) laws, as follows:

> Furthermore, neither preemption provision would preempt the ability of a State to issue a certificate or other documentation (in written or electronic form) demonstrating that the carrier complies with State requirements which are not preempted by these sections and nothing in this amendment is intended to change the application of State tax laws to motor carriers.

House Conference Report, 103-677, p. 85, reprinted in 1994 U.S.C.C.A.N. 1757.

Petitioners, however, claim that a broad preemptive purpose can be ascertained by looking at the language Congress has used to deregulate the airline industry (citing Airline Deregulation Act of 1978 (ADA), 49 U.S.C. 41713). Petitioners indicate that the ADA prohibited the states from enacting or enforcing Laws "relating to rates, routes, or services." Citing the House Conference Report on Section 601, Petitioners claim that this Court's decision in *Morales v TransWorld Airlines*, 504 U.S. 374; 112 S. Ct. 2031; 119 L. Ed. 2d 157 (1992) should be the starting point for any determination of the preemptive effect of the FAAAA.

The *Morales* case, however, involved a different issue, under a different Act, relating to solely to airlines. Furthermore, the FAAAA, adopted in August 1994, and effective January 1, 1995, was simply not before this Court in *Morales* in 1992. As with any other statutory construction issue, and as the Michigan Court of Appeals below held, any analysis of Section 601 of the FAAAA should start with the plain language of the FAAAA itself. The Michigan Court of Appeals properly addressed itself to the plain language of the FAAAA in determining its preemptive scope. Moreover, a review of House Conference Report 103-677 indicates that the Michigan Court of Appeals' reading of the language of the FAAAA was correct.

It should also be noted that Section 601 was expressly given prospective, not retroactive, effect. By its terms, Section 601 is effective January 1, 1995. The FAAAA did not transform this Court's ruling in *Morales*, applicable to an airline, into a retroactive preemption of state law relative to motor carrier regulation. Moreover, the MPSC prior to the adoption of Section 601 had already ruled that economic regulations related to rates, routes, or services do not apply to air carriers, or to motor carrier operations integrated with air carriers, but would apply only to ground-only motor carrier

functions, not having a connection with air carriers.[2] Thus, the MPSC has always regulated in a manner consistent with the 1992 *Morales* decision.

Also, in *Morales,* the airlines sued to enjoin various State attorneys general from enforcing state guidelines requiring that airline advertisements contain certain disclosures as to fare terms, restrictions and availability. The Court concluded that the airlines' advertisements "relat[ed] to rates" and were therefore preempted by the ADA. This Court, however, in *Morales* emphasized the limited reach of its holding:

> Nor need we address whether state regulation of the non-price aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly 'relat[e] to' rates; the connection would obviously be far more tenuous. . . . *'[s]ome [S]tate actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect.* (Emphasis added).

504 U.S. at 390.

Both Section 601 itself and House Conference Report 103-677 thus indicate that with the preemption of state regulation "related to a price, route, or service of a motor carrier" that Congress listed, by example and not limitation, several major areas of state regulation which were *not* preempted. Such examples included, *inter alia,* the major area of safety related regulation and the ability of states to review and issue (or deny) statewide certificates of authority to ensure compliance with state and federal law. Similarly, Section 601 contains no language suggesting that the collection of fees is in any way altered. In fact, the presumption is that the fee collection power was continued in order to provide

[2] The MPSC in its August 25, 1992 Order *In Re Federal Armored,* MPSC File No. 23409, Case No. 5, determined that the economic regulation of motor carrier air-ground services were subject to preemption under Section 1305 of the Airline Deregulation Act, but the carrier's strictly ground-based services were not preempted.

revenues to ensure proper safety related regulation, and to ensure that the motor carrier industry pays its fair share of services rendered by the states, which benefit motor carriers.

The legislative history indicates that a primary intent behind Section 601's preemption was to provide a level playing field relative to *economic* regulation of motor carriers and air carriers, and *not* to impact safety or other non-economic motor carrier regulation. House Conference Report, 103-677, pp. 85-87, reprinted in 1994 U.S.C.C.A.N. 1757-1759. Thus, the overriding goal of Section 601 was to put all motor carriers on an equal competitive footing regardless of whether their services did or did not include an air carrier component. Therefore it may be seen that the FAAAA's preemption relates to the *economic* regulation relating to a "price, route, or service" and not to other regulatory areas, and not to areas of state regulation that Section 601 expressly exempted from preemption (safety, fitness, etc).

3. The Michigan Court of Appeals Correctly Held That FAAAA Section 601 Does Not Preempt The MMCA Fee Provisions.

Petitioners argue that M.C.L. 478.1, 478.2(1) and 478.2(2), which provide for the collection of fees, were preempted by Section 601 as of January 1, 1995. The Petitioners' entire theory, however, is based upon the erroneous premise that the fees are to be impliedly swept into preemption as relating to "a price, route, or service of any motor carrier." As noted, however, neither the issuance and renewal of statewide certificate authority, nor the state fees at issue, were intended to be preempted by Congress, as they are not related to "a price, route, or service" of a motor carrier.

The Petitioners fail to acknowledge that Congress, by expressly preserving significant aspects of state motor carrier regulation such as safety, fitness, etc., adopted only a partial preemption of state law. Moreover, the part of regulation preempted by Section 601 does not affect the regulatory fees in this case as the MPSC has not engaged in any economic or

other regulation preempted by Section 601. Since January 1, 1995, the MPSC has only engaged in regulatory activity, such as safety, which is expressly not preempted by Section 601, and has used all collected regulatory fees only for said activity or to reimburse the state for motor carrier related costs.

The Michigan Court of Appeals below correctly found that the clear and unambiguous language of Section 601 expressed Congressional intent *not* to preempt all state regulation of the trucking industry. The Court of Appeals characterized Section 601's preemptive effect as follows:

> Congressional intent is the cornerstone of preemption analysis. *Ryan v Brunswick Corp*, 454 Mich 20, 27; ___ NW2d ___ (1997). Regardless of the similarities between the Airline Deregulation Act of 1978 and § 601 of the FAAAA, it is clear and unambiguous from the language of § 601 that the congressional intent was not to preempt all state regulation of the trucking industry. Section 601 expressly excepts from its preemptive effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of insurance requirements, and regulation of the transportation of household goods. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent. (223 Mich App 288, 301). (Pet. App. 17).
>
> [T]he House Conference Report indicates that "economic regulation" is intended to be preempted and that states retain their authority to regulate various aspects of the transportation industry. See H R Conf Rep No 677, 103rd Cong, 2nd Sess, pp 84-85. The title given to 49 USC 11501(h) is "Preemption of State *Economic* Regulation of Motor Carriers." (Emphasis added.) Appellants' argument that Congress intended to preempt the entire field of regulation of motor carriers fails in the face of

> the language of the legislation and its history. The PSC's determination that § 601 was intended to preempt only economic regulation is consistent with the language and history of the legislation. (Pet. App. 17).

Although the Petitioners' claim that preemptive effect of the FAAAA was more extensive than what the Michigan Court of Appeals found, they have failed to address or rebut major underpinnings of the Michigan Court of Appeals' decision. For example, the Court of Appeals found that the FAAAA, *by its own terms,* does not support the "broad sweep of the federal motor carrier preemption", urged by the Petitioners.

The Petitioners fail to come to grips with the fact that the Michigan Court of Appeals finding with respect to the extent of the FAAAA's preemption comes from a plain reading of that Act. In essence, what the Michigan Court of Appeals found is that because the statute is clear and unambiguous, no statutory interpretation is necessary. Thus, the language of the statute controls.

Additionally, the Petitioners have failed to contest two critical findings made by the Michigan Court of Appeals, 223 Mich. App. 288, 302-303, where the Court states:

> In fact, *because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules.* Indeed, appellants Central Transport and Universal Ameritech-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees its collects, and they *have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation.* (Pet. App. 18-19).

In summary, Section 601 contains no language that preempts the continued authority of the states to grant

statewide certificates to ensure continued compliance with state and federal laws applicable to motor carriers, and to collect applicable fees to fund non-preempted regulation such as safety and fitness. Moreover, Congressional intent, discussed *supra*, indicates that no preemption of statewide certificates or fees was intended.

Pet. App. 59-60.

4. A Major Purpose Of The MMCA Extends To Safety Regulation, Which Has Been Preserved By FAAAA Section 601.

Petitioners erroneously contend that the sole focus of the MMCA state economic regulation of motor carriers. Petitioners are incorrect because the MMCA, since its enactment in 1933, has had the dual purpose of not only economic regulation, but also, importantly, safety regulation.

The very first titled purpose of the Motor Carrier Act is "to promote safety upon and conserve the use of public highways of the state..." This is restated in the purpose and policy section of the Act, M.C.L. 475.2; M.S.A. 22.532, which states in part as follows:

> It is hereby declared to be the purpose and policy of the Legislature in enacting this law to confer upon the Commission the power and the authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to:... (b) *protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways;...* (emphasis added).

The current title to the MMCA also provides for the collection of fees and taxes from motor carriers to promote highway safety and conservation as follows:

> [T]o provide for the levy and collection of certain privilege fees and taxes for such carriers *for such purposes* and the disposition of such fees and taxes; ... (emphasis added).

The MMCA extensively addresses safety, fitness, and insurance issues. M.C.L. 475.5; M.S.A. 22.533(3) tailors the duration of evidentiary proceedings to accommodate fitness issues, and M.C.L. 476.3; M.S.A. 22.536 requires Commission review of applications for certificates of authority to verify the physical condition of the equipment and property of the applicant as well as to ascertain that the vehicles of the applicant have passed an inspection within the proceeding 12 months pursuant to the requirements of the Motor Carrier Safety Act, 1963 P.A. 181, M.C.L. 480.11, *et seq.*; M.S.A. 9.1666(1a) *et seq.*

Sections 476.5, 476.10, 478.7, 479.9, 479.10, 479.11, 479.12 and 479.13 all underscore and amplify the Commission's regulatory duties relating to public safety as they apply to motor carriers. These sections spell out the Commission's responsibilities ranging from insurance monitoring and other record checking to leasing, contested case evidentiary presentations, rulemaking responsibilities, and collection of assessments. The MPSC is also granted "authority to prevent evasion of this act through any device or arrangement" [Title and M.C.L. 475.2(l)] and to do "all things necessary to carry out and enforce this act." (M.C.L. 476.10).

Both the MPSC and the State Police also act in concert, in many instances, to enforce both the MMCA and the Michigan Motor Carrier Safety Act, 1963 P.A. 181, M.C.L. 480.11, *et seq.*; M.S.A. 9.1666(1a), *et seq.* In addition, a recent act, 1993 P.A. 352, effective January 13, 1994, now Article VI of the MMCA, M.C.L. 479.41; M.S.A. 22.587(1) ("Art VI"), which expands the MPSC jurisdiction and authority relative to motor carrier safety, in conjunction with the State Police, states:

> Sec. 1. The commission shall supervise and regulate the safety of operations of each motor carrier. The commission may promulgate rules

> for the purpose of promoting safety upon the highways and the conservation of their use. [M.C.L. § 479.41; M.S.A. 22.587(1)].
>
> * * *
>
> Sec. 2. Upon request of the commission, the department of state police shall review the operation of an intrastate motor carrier to determine whether the carrier is in compliance with applicable safety related laws and rules and issue a report within 60 days after completion of its review to the commission. [M.C.L. § 479.42; M.S.A. 22.587(2)].
>
> * * *
>
> Sec. 3. The public service commission, in cooperation with the department of state police, will develop and implement by rule or order a motor carrier safety rating system within 12 months after the effective date of this article. In the rating system, an unsatisfactory rating shall not be imposed without an on-site safety review being conducted by the department of state police. [M.C.L. § 479.43; M.S.A. 22.587(3)].

MMCA Art VI thus explicitly authorizes cooperative functions between the MPSC and State Police in furthering motor carrier related public safety. Pursuant to Art. VI, the MPSC may request State Police review of the operations of particular motor carriers for compliance with safety related laws and rules. Moreover, the two agencies are directed to cooperate in developing a motor carrier safety rating system which is now in place and is being administered by the MPSC.

In light of the foregoing, the Petitioners contention that the MMCA's sole focus was the economic regulation of motor carriers lacks merit. Instead, the MMCA contains numerous provisions related to safety and other matters not preempted by Section 601 of the FAAAA. The MPSC has made a good faith effort to comply with federal law and has done so by identifying those provisions of the MMCA that were preempted by the FAAAA and which would no longer be enforced by the MPSC pending anticipated action by the

Michigan Legislature to conform the MMCA with the FAAAA. The determinations made by the MPSC are consistent not only with the plain language of Section 601 of the FAAAA but also with the legislative history underlying that enactment. The Michigan Court of Appeals' decision affirming the MPSC's decision and the Michigan Supreme Court's denial of the Petitioners' Application for Leave to Appeal to that Court were correct.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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In The

Supreme Court of the United States

October Term, 1998

CENTRAL TRANSPORT, INC. and
UNIVERSAL AM-CAN, LTD.,

Petitioners,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

PETITIONERS' REPLY TO BRIEF OF RESPONDENT

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15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY TO BRIEF OF RESPONDENT.. 1

A. The Explicit Wording Of The Federal Preemption Legislation Prohibits Imposition Of Administrative Fees The Purpose Of Which Are To Support The Operations Of An Economic Regulatory Structure For The Motor Carrier Industry Found By Congress To Impede Interstate Commerce 1

B. Respondent Would Have This Court Ignore The Substantial Body Of Case Law With Respect To The Broad Effect Of The Preemption Language In § 601, Drawn As That Language Is From The Airline Deregulation Act Of 1978.. 3

C. The Fee Provisions In The MMCA Are Regulatory Fees To Pay For State Economic Regulation, Not General Taxes 4

D. The 1993 Amendments To The MMCA, Adding An Article VI, Did Not Change The Economic Regulatory Purpose Of The Act 6

E. The Two "Critical" Findings Of The Michigan Court Of Appeals Relied Upon By Respondent Had No Support In The Record And Are Contrary To Fact 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Federal:

American Airlines v. Wolens, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995) 3, 4

Morales v. Trans World Airlines, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) 3, 4

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988) 3

State:

Almar Trucking, Inc. v. Bonanza Trucking Co., 8 Mich. App. 369, 154 N.W.2d 573 (1967) 7

Associated Truck Lines, Inc. v. Michigan Public Service Comm., 377 Mich. 259, 140 N.W.2d 515 (1966), *appeal after remand sub nom*, 73 Mich. App. 476, 252 N.W.2d 495 (1977), *appeal after remand*, 84 Mich. App. 241, 269 N.W.2d 548 (1978), *remanded*, 404 Mich. 808, 272 N.W.2d 563 (1978) 6

Belt v. Ritter, 385 Mich. 402, 189 N.W.2d 221 (1971), *aff'g*, 18 Mich. App. 495, 171 N.W.2d 581 (1969) 7

Central Transport, Inc. v. Ingham Circuit Judge, 368 Mich. 615, 118 N.W.2d 831 (1962) 6

Federal Armored Service v. Public Service Commission, 204 Mich. App. 24, 514 N.W.2d 178 (1994) 7

Furniture Capital Truck Lines, Inc. v. Michigan Public Service Comm., 340 Mich. 173, 65 N.W.2d 303 (1954) 6

G&A Truck Line, Inc. v. Michigan Public Service Comm., 337 Mich. 300, 60 N.W.2d 285 (1953) 6

TABLE OF AUTHORITIES – Continued

Page

G&B Transportation Co. v. Michigan Public Service Comm., 19 Mich. App. 379, 172 N.W.2d 898 (1969) 7

George F. Alger Co. v. Michigan Public Service Comm., 339 Mich. 104, 62 N.W.2d 588 (1954) 6

Giaras v. Michigan Public Service Comm., 301 Mich. 262, 3 N.W.2d 268 (1942) 6

Greyhound Corp. v. Michigan Public Service Comm., 360 Mich. 578, 104 N.W.2d 395 (1960) 6

J.E. Bejin Cartage Co. v. Michigan Public Service Comm., 352 Mich. 139, 89 N.W.2d 107 (1958) 6

Kirkby v. Michigan Public Service Comm., 320 Mich. 608 32 N.W.2d 1 (1948) 6

Koss v. Public Service Comm., 333 Mich. 396, 53 N.W.2d 491 (1952) 6

Lafayette Transfer & Storage Co. v. Michigan Public Utilities Comm., 287 Mich. 488, 283 N.W. 659 (1939) 6

In Re: Manufacturer's Freight Forwarding Co., 294 Mich. 57, 292 N.W. 678 (1940) 6

Robert McDaniel Trucking Co. v. Oak Construction Co., 359 Mich. 494, 102 N.W.2d 575 (1960) 6

Merrelli v. St. Clair Shores, 355 Mich. 575, 96 N.W.2d 144 (1959) 5

Michigan Intra-State Motor Tariff Bureau v. Public Service Comm., 200 Mich. App. 381, 504 N.W.2d 677 (1993), appeal denied, 445 Mich. 880, 519 N.W.2d 886 (1994) 7

TABLE OF AUTHORITIES – Continued

Page

Morgan Drive Away, Inc. v. Michigan Public Service Comm., 20 Mich. App. 564, 174 N.W.2d 587 (1969) 7

Olson Transportation Co. v. Michigan Public Service Comm., 381 Mich. 427, 163 N.W.2d 213 (1968), *rev'd*, 8 Mich. App. 421, 154 N.W.2d 563 (1967) 7

Telischak Trucking, Inc. v. Michigan Public Service Comm., 11 Mich. App. 23, 160 N.W.2d 592 (1968) 7

Vernor v. Secretary of State, 179 Mich. 157, 146 N.W. 338 (1914) 5

People v. Wiegand, 369 Mich. 204, 119 N.W.2d 545 (1963) 6

Yankoviak v. Michigan Public Service Comm., 349 Mich. 642, 85 N.W.2d 75 (1957) 6

CONSTITUTIONAL PROVISIONS/STATUTES/REGULATIONS

Federal:

Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, Title IV, 108 Stat. 1604 1

Airline Deregulation Act of 1978, Pub. L. No. 95-405, 92 Stat. 1707 3

49 U.S.C. § 14501(c) 1

49 U.S.C. § 14501(c)(2)(A) 1

49 U.S.C. § 14504 2

49 U.S.C. § 14504(c)(2)(B)(iv)(III) 5

TABLE OF AUTHORITIES – Continued

Page

State:

Mich. Const. 1963, Art. IV, § 24 7

Mich. Const. 1963, Art. IV, § 32 4

Michigan Motor Carrier Act, M.C.L. 475.1, *et seq.* 2

Motor Fuel Tax Act, M.C.L. 207.101 *et seq.* 5

Motor Carrier Safety Act, M.C.L. 480.11, *et seq.* 7

Motor Vehicle Code, M.C.L. 257.01, *et seq.* 2

M.C.L. 257.33 2

M.C.L. 257.801 *et seq.* 5

M.C.L. 475.1(a) 2

M.C.L. 475.1(j) 2

M.C.L. 478.2 4

M.C.L. 479.2 2

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS

A. The Explicit Wording Of The Federal Preemption Legislation Prohibits Imposition Of Administrative Fees The Purpose Of Which Are To Support The Operations Of An Economic Regulatory Structure For The Motor Carrier Industry Found By Congress To Impede Interstate Commerce.

Michigan, in support of the continued imposition of economic regulatory fees on the motor carrier industry, seeks to have this Court ignore the explicit preemption language contained in § 601 of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), now codified at 49 U.S.C. § 14501(c). It is true, as the Michigan Public Service Commission ("MPSC"), points out in its Brief in Opposition to the issuance of a Writ of Certiorari, that the preemption in this case was not total. It was not total because Congress explicitly carved out continued state jurisdiction over certain *specified* safety matters, the transportation of household goods, and five identified state standard transportation practices. Contrary to the argument of Respondent MPSC, however, Congress took the time to define with specificity the preemption. The residual authority of the state is limited particularly to those matters identified in the federal preemption statute itself. There was no general safety authority left to the states by the preemption. The states were limited at 49 U.S.C. § 14501(c)(2)(A) in the safety area to exercise authority over the following three areas: 1) *motor vehicles;* 2) highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo; and 3) regulation of "*motor carriers* with respect to minimum amounts of financial

responsibility relating to insurance requirements and self-insurance authorization." (Emphasis added.)

The state laws of Michigan, with respect to motor vehicles, are not contained in the economic regulatory statute that is the Michigan Motor Carrier Act, M.C.L. 475.1, *et seq.* ("MMCA"), conferring jurisdiction on the MPSC, but in the state Motor Vehicle Code, M.C.L. 257.01, *et seq.* The MMCA is concerned not with the safety regulation of motor vehicles, defined at M.C.L. 257.33 as "every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails" (a similar all-inclusive definition for motor vehicles occurs in the MMCA at M.C.L. 475.1(a)), but with regulation of motor carriers defined in the MMCA as for-hire, common and contract carriers of property, but not "private carriers," at M.C.L. 475.1(j). The Michigan Public Service Commission has no authority over motor vehicles, generally, then. To the extent it held any authority, it was only over intrastate for-hire trucking operations (any registration of interstate operations by the MPSC was limited by the provisions in the United States Code, presently found at 49 U.S.C. § 14504 – even a wide variety of for-hire intrastate operations were exempted from the Act by particular exceptions contained in the MMCA at M.C.L. 479.2). There are no size, weight and hazardous materials controls or limitations contained in the MMCA, those appearing, instead, in the Motor Vehicle Code.

Thus, the MPSC, according to the specific terms of the federal preemption, is left with authority over only insurance requirements, not some unspecified safety or general fitness requirements, as argued in the MPSC's

Brief in Opposition. (See Respondent's Brief in Opposition, referring to the undefined term "fitness," p. 9 (twice), p. 14, p. 17 and p. 18). Respondent's use of the term "fitness," nowhere referred to in § 601, is revealing of the manner in which the MPSC has ignored the explicit preemption contained in the congressional language itself, and is contrary to the test set forth in cases such as *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988), and takes an expansive and incorrect view of the narrow jurisdiction left to it.

B. Respondent Would Have This Court Ignore The Substantial Body Of Case Law With Respect To The Broad Effect Of The Preemption Language In § 601, Drawn As That Language Is From The Airline Deregulation Act Of 1978.

Congress deliberately utilized the same language in the § 601 motor carrier preemption that it had utilized previously in the Airline Deregulation Act of 1978, Pub. L. No. 95-405, 92 Stat. 1707, in preempting state regulation over the airline industry. Congress went so far as to spell out in the conference report its intent to accomplish the very kind of preemption as had been effected through the Airline Deregulation Act language, as well as decisions of this Court with respect to the meaning of that language, and particularly, *Morales v. Trans World Airlines*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). Within days of the effective date of the motor carrier preemption, this Court handed down still another case on the meaning of the Airline Deregulation Act preemption in *American Airlines v. Wolens*, 513 U.S. 219, 115 S.Ct. 817,

130 L.Ed.2d 715 (1995). Both *Morales* and *Wolens* emphasize the exceedingly broad scope of the preemption language used in the Airline Deregulation Act, and, by necessary implication, in the motor carrier preemption as well. Congress, not Petitioners, pointed to the *Morales* case as a starting point in interpreting the motor carrier preemption. There is no "retroactive preemption" involved in Petitioners' arguments, as Respondent claims at page 12 of its Brief in Opposition. The preemption took effect on January 1, 1995. It affected the economic regulatory statutes, such as the MMCA, from that day forward, including its fee provisions.

C. The Fee Provisions In The MMCA Are Regulatory Fees To Pay For State Economic Regulation, Not General Taxes.

Respondents seek to protect the fees contained in the economic regulatory statute by referring to a statement in the Conference Report with respect to "state tax laws" (Respondent's Brief in Opposition, p. 11). There is language in Respondent's Brief in Opposition which equates "fee collection powers" to taxes on the motor carrier industry at pages 13-14. Respondent would have this Court disregard the fact that Michigan law distinguishes clearly between fees and taxes, and constitutionally prohibits states from imposing taxes without denominating them as such. The fees contained in the MMCA are, by the very terms of MMCA, referred to as "fees," not "taxes," at M.C.L. 478.2, and further provide that those fees are "for the administration of the Act." They are not general revenue taxes. This is unconstitutional under the provisions of the Michigan Constitution of 1963, Art. IV,

§ 32, which states: "Every law which imposes, continues or revives a tax shall distinctly state the tax." Michigan's taxes on motor carriers, particularly with respect to registration and fuel, are found in the Motor Vehicle Code at Chapter 7 thereof, M.C.L. 257.801 *et seq.*, and in the Motor Fuel Tax Act, M.C.L. 207.101 *et seq.* The fees in this case, asserted by Respondent to be necessary to "insure that the motor carrier industry pays its fair share of services rendered by the states," do not affect the trucking industry generally, even under Respondent's mistaken view (*i.e.*, the fees are not collected from private carriers, exempt carriers, and interstate carriers).

Illustrative cases supporting this principle include *Vernor v. Secretary of State*, 179 Mich. 157, 146 N.W. 338 (1914), in which the Michigan Supreme Court struck down an automobile license fee which generated revenues in excess of those required by its regulatory purposes, and *Merrelli v. St. Clair Shores*, 355 Mich. 575, 96 N.W.2d 144 (1959), where the Michigan Supreme Court held that the revenue derived from the challenged fee was entirely disproportionate to the cost of the issuance of the involved permits. Congress has, in fact, at 49 U.S.C. § 14504(c)(2)(B)(iv)(III), established a maximum fee of $10.00 per year per vehicle for registration of interstate operations (and insurance) with the states, an amount far exceeded by the $100.00 per year per vehicle which is still being charged by Michigan. That fee was designed to pay for intrastate economic regulation, a purpose which has been vitiated by congressional action in § 601 itself. Involved in this case is not a state tax on motor vehicles or motor carriers, but an economic regulatory fee. It contravenes the purposes of the preemption.

D. The 1993 Amendments To The MMCA, Adding An Article VI, Did Not Change The Economic Regulatory Purpose Of The Act.

It is true that the MMCA regulated safety as a component part of the economic regulation of for-hire intrastate motor carriers, but only as a small component of that regulation, and that the economic regulatory provisions amended in 1993 had safety aspects as well. A review of all of the reported appellate cases from that law finds that they all center upon entry and rate regulation from an economic standpoint.[1] This is far different than

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[1] A review of all of the pre-preemption appellate cases involving the Michigan Motor Carrier Act undisputably supports this proposition. These cases involve disputes over regulated rates and routes, pursuant to the Act's provisions. See, in this regard, *Lafayette Transfer & Storage Co. v. Michigan Public Utilities Comm.*, 287 Mich. 488, 283 N.W. 659 (1939); *In Re: Manufacturer's Freight Forwarding Co.*, 294 Mich. 57, 292 N.W. 678 (1940); *Giaras v. Michigan Public Service Comm.*, 301 Mich. 262, 3 N.W.2d 268 (1942); *Kirkby v. Michigan Public Service Comm.*, 320 Mich. 608, 32 N.W.2d 1 (1948); *Koss v. Public Service Comm.*, 333 Mich. 396, 53 N.W.2d 491 (1952); *G&A Truck Line, Inc. v. Michigan Public Service Comm.*, 337 Mich. 300, 60 N.W.2d 285 (1953); *George F. Alger Co. v. Michigan Public Service Comm.*, 339 Mich. 104, 62 N.W.2d 588 (1954); *Furniture Capital Truck Lines, Inc. v. Michigan Public Service Comm.*, 340 Mich. 173, 65 N.W.2d 303 (1954); *Yankoviak v. Michigan Public Service Comm.*, 349 Mich. 642, 85 N.W.2d 75 (1957); *J.E. Bejin Cartage Co. v. Michigan Public Service Comm.*, 352 Mich. 139, 89 N.W.2d 107 (1958); *Robert McDaniel Trucking Co. v. Oak Construction Co.*, 359 Mich. 494, 102 N.W.2d 575 (1960); *Greyhound Corp. v. Michigan Public Service Comm.*, 360 Mich. 578, 104 N.W.2d 395 (1960); *Central Transport, Inc. v. Ingham Circuit Judge*, 368 Mich. 615, 118 N.W.2d 831 (1962); *People v. Wiegand*, 369 Mich. 204, 119 N.W.2d 545 (1963); *Associated Truck Lines, Inc. v. Michigan Public Service Comm.*, 377

being a safety regulatory act. Indeed, the regulation of motor carriers generally, including both private and for-hire motor carriers, is left to the Michigan State Police in a totally separate regulatory statute at M.C.L. 480.11, *et seq.*, the Motor Carrier Safety Act. Also, the Michigan Constitution prohibits the Legislature from enacting legislation that has more than one object through a constitutional provision which states that "no law shall embrace more than one object. . . . " That provision further states that bills shall not be amended " . . . so as to change [their] original purpose." Mich. Const. 1963, Art. IV, § 24.

In fact, the safety component of the economic regulatory statute which was preempted by § 601 was not of such significance as to ever generate a single case in the

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Mich. 259, 140 N.W.2d 515 (1966), *appeal after remand sub nom*, 73 Mich. App. 476, 252 N.W.2d 495 (1977), *appeal after remand*, 84 Mich. App. 241, 269 N.W.2d 548 (1978), *remanded*, 404 Mich. 808, 272 N.W.2d 563 (1978); *Almar Trucking, Inc. v. Bonanza Trucking Co.*, 8 Mich. App. 369, 154 N.W.2d 573 (1967); *Telischak Trucking, Inc. v. Michigan Public Service Comm.*, 11 Mich. App. 23, 160 N.W.2d 592 (1968); *Olson Transportation Co. v. Michigan Public Service Comm.*, 381 Mich. 427, 163 N.W.2d 213 (1968), *rev'd*, 8 Mich. App. 421, 154 N.W.2d 563 (1967); *G&B Transportation Co. v. Michigan Public Service Comm.*, 19 Mich. App. 379, 172 N.W.2d 898 (1969); *Morgan Drive Away, Inc. v. Michigan Public Service Comm.*, 20 Mich. App. 564, 174 N.W.2d 587 (1969); *Belt v. Ritter*, 385 Mich. 402, 189 N.W.2d 221 (1971), *aff'g*, 18 Mich. App. 495, 171 N.W.2d 581 (1969); *Michigan Intra-State Motor Tariff Bureau v. Public Service Comm.*, 200 Mich. App. 381, 504 N.W.2d 677 (1993), appeal denied, 445 Mich. 880, 519 N.W.2d 886 (1994); *Federal Armored Service v. Public Service Comm.*, 204 Mich. App. 24, 514 N.W.2d 178 (1994). These cases reveal a pattern of an industry where competition and rate-making had been severely limited by statute.

Michigan appellate courts either before or after its 1993 amendments concerning the safety aspect of the economic regulatory Act. It is disingenuous for the MPSC to contend otherwise.

E. The Two "Critical" Findings Of The Michigan Court Of Appeals Relied Upon By Respondent Had No Support In The Record And Are Contrary To Fact.

The Court of Appeals, in rejecting Petitioners' position on preemption, stated that the MPSC was not using its resources to enforce "preempted portions" of the MMCA, that Petitioners had not shown that the MPSC's operations had ever been totally funded by the fees it collected, and that such fees could be used for what is now preempted economic regulation. However, the record which was before the Court of Appeals was closed before the preemption took effect. There were *no facts in the record* before the MPSC upon which the Court of Appeals could have affirmed these conclusions. In fact, these fees have generated significant surpluses for the State of Michigan, even during the heyday of economic regulation. In fact, those fees are utilized in part for the continued economic regulation of the still-economically regulated household goods carriers. The authority of the State of Michigan and Respondent MPSC, after the preemption took effect, was limited to those few enumerated safety matters. There was not general authority "to grant statewide certificates to insure continued compliance with state and federal laws applicable to motor carriers," as asserted boldly by Respondent in its Brief in Opposition at p. 16-17. Of course, the MPSC continues to collect

the $100.00 per year per vehicle fee from Michigan intrastate carriers when its act was preempted, for all but the monitoring of insurance registrations. To allow the MPSC to continue to do so offends the very language of the § 601 preemption and burdens interstate commerce.

CONCLUSION

This Petition for Writ of Certiorari should be granted, so that the offensive activities of Respondent MPSC, in violation of the explicit language of the federal statute, can be fully reviewed by this Court.

Respectfully submitted,

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